UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

IN THE MATTER OF: TRI-MESSINE CONSTRUCTION COMPANY, INC. AND ITS ALTER EGO CALLAHAN PAVING CORP. Respondents and LOCAL 175, UNITED PLANT AND PRODUCTION WORKERS, Charging Party and HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS LOCAL 1010, LIUNA, AFL-CIO, Party in Interest	Case Nos. 29-CA-194470 Case Nos. 29-CA-206246

MEMORANDUM OF LAW OF RESPONDENTS TRI-MESSINE CONSTRUCTION COMPANY, INC. AND CALLAHAN PAVING CORP.

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Tri-Messine Construction Company, Inc. ("Tri-Messine") and Callahan Paving Corp. ("Callahan") submit this memorandum of law in support of their position that the complaint in this matter be dismissed in its entirety. Faced with an extremely difficult situation, Tri-Messine took action to save its company *and* the jobs of dozens of employees — action that was entirely consistent with the National Labor Relations Act ("Act"). It did not repudiate its union contract, nor discriminate against union members. Tri-Messine satisfied its obligation to bargain under the Act.

Tri-Messine is a paving contractor that performs work in New York City. For a number of years Tri-Messine's employees were represented by Local 175, United Plant and Production Workers ("Local 175"). The undisputed facts elicited at the hearing demonstrated that depending on the year, approximately 93% - 98% of Tri-Messine's work was directly related to its multi-million dollar, multi-year paving contract with Consolidated Edison of New York ("Con Edison").

In October 2014 Con Edison announced that going forward, all construction contractors would be required to comply with its Standard Terms and Conditions for Construction Contracts (hereinafter "Standard Terms & Conditions") which stated in part:

> With respect to Work ordered for Con Edison, unless otherwise agreed to by Con Edison, Contractor shall employ on Work at the construction site only union labor from building trades locals (affiliated with the Building & Construction Trades Council of Greater New York) having jurisdiction over the Work to the extent such labor is available.

It is undisputed that Local 175 was not and has never been affiliated with the Building & Construction Trades Council of Greater New York ("B&CTC").

In the Fall of 2016, Con Edison's 2017 - 2020 paving contract for Brooklyn, Queens and the Bronx came up for bid. Several contractors submitted bids and Tri-Messine was determined to be the lowest bidder. Nonetheless, Al Messina, President and sole owner of Tri-Messine was repeatedly advised by representatives of Con Edison that the contract would not be awarded to Tri-Messine unless it first demonstrated that all of its collective bargaining agreements covering workers performing Con Edison work were with labor organizations affiliated with the B&CTC. Faced with the undeniable loss of his entire business, as well as the loss of employment of *all* workers (union and non-union), Tri-Messine subcontracted its work to Callahan Paving Corp. Callahan, in turn, entered into a collective bargaining agreement with Local 1010 – a union affiliated with the B&CTC and a labor organization that had jurisdiction over paving work – so that the Con Edison work could be performed. Callahan also ensured that it had contracts with Local 282 of the International Brotherhood of Teamsters ("Local 282") and Local 15 of the International Union of Operating Engineers ("Local 15"), two other unions affiliated with the B&CTC. There was no choice in the matter; either the work was performed by unions affiliated with the B&CTC or the work would be lost forcing Tri-Messine to lay off all of its employees and go out of business. Throughout the months leading up to the eventual subcontract Tri-Messine regularly met with Local 175 representatives to discuss the situation.

Under these circumstances, Tri-Messine's actions were entirely lawful and the Complaint herein should be dismissed for several reasons, including:

- Once the Standard Terms & Conditions were enforced by Con Edison, Local 175 members were incapable of performing the work at issue. They simply were not "qualified" to perform the work. As such, it was not Local 175's work to perform and the subcontracting to Callahan was consistent with the collective bargaining agreement and entirely lawful.

- Tri-Messine and Callahan are not alter egos. The Con Edison work could not be performed by Tri-Messine so there was no "continued" operation of work. There was no

attempt to "disguise" the subcontracting to Callahan or otherwise evade bargaining obligations. Workers actually benefitted from the subcontracting by ultimately not losing their jobs. The subcontracting was for legitimate business reasons.

- The decision to subcontract the work was a core entrepreneurial decision that simply is not amenable to collective bargaining. There was nothing Local 175 could offer that would enable Tri-Messine to keep the work with Local 175 workers. It was Con Edison's decision that only B&CTC affiliated unions could perform the work and neither Local 175 nor Tri-Messine, despite their efforts, could change that fact.

- Further, the Board has long held that an employer may act unilaterally when it is faced with exigent circumstances. Here it is difficult to imagine how much more "exigent" the circumstances could have been. Tri-Messine was losing its only major customer – one that had provided 97% of its work in 2016. If it did nothing, the loss of Con Edison's business would result in the closedown of Tri-Messine and permanent loss of jobs for dozens of employees.

- Under the doctrine of impossibility, as recognized by the Board, it was impossible to use Local 175 labor to perform the Con Edison work.

- In addition, to the extent Tri-Messine had an obligation to bargain over the decision and effects of this decision, it fulfilled that obligation. Tri-Messine repeatedly met with and had discussions with Local 175 about the Standard Terms and Conditions and the layoffs that would result and offered additional meetings. Al Messina routinely met with Local 175 representatives Roland Bedwell and Anthony Franco to discuss the matter. Everyone was aware of the situation as it had already "played out" with another Con Edison paving contractor, Nico Asphalt Paving, which previously employed Local 175 unit members. Also, Local 175 had commenced litigation warning of the impact the Standard Terms & Conditions would have on its members. Messina met weekly with Bedwell and he met with Franco on numerous occasions as well. Tri-Messine also accepted Local 175's offer to have a meeting with its attorneys, but Local 175 subsequently reneged on its offer. In short, Tri-Messine did in fact bargain with the union.

- Alternatively, even though Tri-Messine routinely met with the union, the testimony of the hearing demonstrated that Local 175 admittedly failed to request timely bargaining with Tri-Messine despite being told in early January 2017 that Con Edison was adhering to the Standard Terms & Conditions and it would have to subcontract the work. The work was not subcontracted until March 2017. Further, there is undisputed evidence that Tri-Messine offered to negotiate the effects or impact of the decision to subcontract its work. Local 175 took no action to follow up on Tri-Messine's offer.

- Al Messina did everything possible to try and save the jobs of Tri-Messine's workers. When Local 1010 refused Callahan's request that it hire Tri-Messine's existing Local 175 employees, but rather required that they be hired through its hiring hall, numerous Tri-Messine Local 175 employees who had the necessary certifications were placed in other unions (Local 282 and Local 15), often receiving higher pay than required by the contract. Although Callahan was unable to persuade Local 1010 to immediately hire Tri-

Messine Local 175 employees despite offering higher wages than requested, eventually almost of these employees who sought employment were hired by Callahan through the 1010 hiring hall. There was no union animus.

- On March 13, 2017 Tri-Messine exercised its right under the clear provision of the collective bargaining agreement to "terminate" its agreement with Local 175 effective June 30, 2017. Under well settled precedent Tri-Messine no longer had any obligation to negotiate with Local 175 for a new contract or to continue the contract's then-existing terms. Moreover, Tri-Messine had no unit employees as Callahan employees had signed authorization cards and were represented by Local 1010.

- The Board lacks jurisdiction over certain allegations as no timely unfair labor practice charge was filed or proper parties were not joined.

- Any remedy herein would be punitive. Asking Tri-Messine to bargain and negotiate a contract with Local 175 would lead to the loss of Con Edison work and the resulting unemployment of all Tri-Messine's workers. Further, Callahan has paid millions of dollars in pension and welfare contributions for its 1010 employees.

In short, Tri-Messine acted legally and appropriately in the handling of this matter. Its actions were not only legal, but saved the jobs of dozens of workers.

FACTS

A. Background

Tri-Messine performs permanent restoration of roadway, *i.e.*, street paving in New York City. (47, 48).[1] The Company has been in business since 1966. (45). Al Messina has been the President of Tri-Messine since 1997. (45). Its office is located at 6851 Jericho Turnpike in Syosset, New York. It also rents truck yards in Flushing, Queens and the Bronx. (49-50). Al Messina is married to Patricia Messina. (46). In the past Ms. Messina performed work for Tri-Messine as a secretary and bookkeeper. (55).

[1] Numbers located in parentheses indicate references to page numbers in the transcript of the proceedings held on April 10 through April 12, 2018.

Tri-Messine's employees were represented by Local 175 for a number of years. (GC Exhibit 6).[2] Tri-Messine had a good relationship with Local 175. (509). There were never any strikes or picketing by Local 175 directed at Tri-Messine. (509). In fact, Messina would often socialize with his employees outside of work. (*Id.*). He would go out with employees after work, watch football with them, and invite them to his house in Pennsylvania, etc. (*Id.*). The most recent contract between Local 175 and the New York Independent Contractors Alliance ("NYICA"), of which Tri-Messine was a member, covered the period July 1, 2014 - June 30, 2017 and applied only to "qualified employees." (GC Exhibit 6, p. 9).

B. Tri-Messine's Work for Con Edison

Con Edison has been a customer of Tri-Messine since 1984. (503). In 2012 Tri-Messine bid for and was awarded a three year paving contract covering the period 2013-2015. (547-548). The contract was later extended by Con Edison for one year, *i.e.*, to cover calendar year 2016. (548-549).

According to Messina, Con Edison made up almost all of Tri-Messine's work. "Ninety-seven percent of our work is Con Edison or companies that work for Con Edison." (71). He further testified:

> In most years, Con Edison is 98 to 99 percent of our work. And in the best year that we ever had any other customers, it was probably 93 or 94 percent of our work.

(503).

In response to questioning from the General Counsel, Messina testified as follows:

> Q I just want to ask you about some of the numbers that you put out there in response to your attorney's questioning. You said that Con Ed made up what percentage of Tri-Messine's work?

[2] References to General Counsel's exhibits shall be designated as "GC Exhibit __" followed by the Exhibit number; and references to Respondents' Exhibits shall be designated as "Resp. Exhibit __" followed by the Exhibit number.

A Some years, 97 to 98 percent. I think at the low, 92 to 93 percent.

* * * *

Q And what was the percentage in 2016?

A I believe it was 97 percent Con Ed-related work.

(544-546).

And in response to counsel for the Party in Interest, Messina stated:

Q Mr. Messina, when General Counsel was asking you about your revenues from sales, you mentioned a $30 million number. What does that number pertain to?

A I believe that's the approximate sales of 2017, which Con Edison makes up about 93 percent of.

Q And how does that compare to your gross revenues from sales in 2016?

A It's -- I think the gross sales in 2016 were 25 – a little over 25 million.

Q And what percent in 2016 of that 25 million was Con Edison work?

A Ninety-seven percent.

(564).

In addition, Tri-Messine performed work for subcontractors of Con Edison. The subcontracting work, which amounted to approximately 10% of Tri-Messine's work, is also subject to the Standard Terms & Conditions. (565). Thus, if the Con Edison work was lost, the subcontracting work would also disappear. (564, 568). For example, Messina testified:

Q If you lost the Con Ed contract, what impact, if any, would that have on the sub work that you mentioned? Safeway, MECC, all the other -- what would happen to that?

A If I don't have the Con Ed work, I wouldn't have that work. The reason why they called me is because I'm the paver in their area for Con Edison. And they call up and say you do the work for

> Con Edison and we want you to do our paving because they're working for Con Edison, too. So I would lose all that business and be -- be out of business.

(568). This work could only be done by unions affiliated with the B&CTC as well.[3]

As noted, in 2016 the Con Edison work and the subcontracts related to Con Edison work made up approximately 97% of Tri-Messine's work. The additional 2-3% of Tri-Messine's work consisted of a very small number of clients, including: 58AJVINDUSTRIES LTD; JP Plumbing; Lady Liberty Contracting Corp.; Sentas Sewer Services, LLC; and TriBoro Plumbing & Heating Corp. (77, GC Exhibit 5-a).

According to Messina, the work for these companies would only amount to a total of $10,000 per year. (505-506, GC Exhibit 5-a). One other company, Liberty Water & Sewer LLC had annual sales of only $500,000. These sales could in no way sustain the company going forward. As Messina testified "Like I said, our insurance bill – our general liability insurance bill is more than that [$500,000]." (506).[4]

Also, in September, 2017 Tri-Messine secured a one time temporary contract with National Grid. (506). This was obviously after the termination of the Local 175 agreement and

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[3] For example, Messina testified that "Tri-Messine can't perform the work for Safeway, because Safeway works for Con Edison and Con Edison requires we use labor affiliated with the building trades, so we have to use 1010 men for the Safeway work as well." (73). Similarly Con Edison's Section Manager Michael Perrino testified that Tri-Messine could not perform the work for Safeway without violating the Standard Terms & Conditions. (464).

[4] All of the other customers listed on GC Exhibit 5-a were either Con Edison or it subcontractors, *i.e.*, J. Fletcher Creamer & Son, Inc., MECC Contracting, Network Infrastructure, Inc., Safeway Construction, Step Mar Contracting Corp. and Vali Industries. Messina repeatedly testified that if he lost the Con Edison work, these contracts would be lost as well:

> Q So if you didn't have the Con Ed work, you wouldn't have those customers?
> A Correct.
> Q And which of those customers are you referring to?
> A MECC Contracting, Network Infrastructure, Safeway Construction, Step Mar Contracting, and Valley Industries.

(504, 549). Perrino confirmed that any construction work for Con Edison subcontractors had to be consistent with the Standard Terms & Conditions. (464).

after the decision to subcontract to Callahan had been made. Moreover, by performing the National Grid work with Local 1010 members, Messina was then able to hire additional former employees who, once the National Grid contact was completed, were able to continue to perform work for Con Edison as members of Local 1010. (507). Also, it was not feasible to perform the minimal non-Con Edison work unless it could be done in conjunction with the Con Edison work. (507-508).

C. Con Edison's Standard Terms & Conditions for Construction Contracts

In late 2014, while his current 2013-2015 contract with Con Edison was still in effect, Messina received a telephone call from Steve Sebastopoli and Tom Portier, employees in the Purchasing Department at Con Edison advising him that there was a "clarification" regarding the Standard Terms & Conditions for Construction Contracts:

> They just wanted to give me a head's up that there was a clarification to the standard terms and conditions that would require us -- on the contracts that were coming up, because our contract was actually supposed to expire in December of 2015, that they would be going forward, that we would have to adhere to the standard terms and conditions that all unions that we use would be affiliated with the Building and Construction Trades of Greater New York Council.

(510). Local 175 was not a member of the B&CTC. Sebastopoli and Portier indicated that a letter would be sent to Messina but no such letter was ever received. (511). Immediately after receiving this phone call Messina contacted Local 175 representatives Franco and Bedwell. (*Id.*). They advised Messina that they had received the same telephone call from Michael Pietronico, the owner of Nico Asphalt as well as the owner of Manna Construction. (*Id.*). Franco testified that Messina and other contractors called him to discuss the new requirements (366). He was hoping that this was another instance of Con Edison saying something but not following through on it. (367).

D. Local 175's Filings With the New York State Public Service Commission

Shortly after Con Edison announced its clarification concerning the scope of the Standard Terms & Conditions, Local 175 filed a petition with the New York State Public Service Commission claiming that Con Edison's Standard Terms & Conditions were unlawful. It also claimed that the implementation of the terms and conditions would severely impact its members:

- "Con Edison's contract terms require contractors to make a difficult decision between declining to bid for multi-million dollar contracts with a concomitant risk of unemployment for their employees, or violating their employees' rights to select their own collective bargaining representative and abrogating their contractual obligations to Local 175." (Resp. Exhibit 1, at p. 8).

- "Since Con Edison's new policy will make it impossible for New York City contractors whose asphalt paver employees are represented by Local 175 to bid on the work, hundreds of asphalt pavers who are members of Local 175 will lose their jobs, because their employers will no longer be permitted to work on Con Edison contracts." (*Id.* at pp. 5-6).

- "Two contractors, Nico Asphalt Paving, Inc. and Tri-Messine Construction, Inc., that have collective bargaining agreements with Local 175, have been advised by Con Edison that they may finish working on contracts that have previously been awarded, but, if they want to bid on any new contracts, they will need to execute collective bargaining agreements with Locals 1010 or 731." (*Id.* at p. 7).

- "Con Edison's Contract Terms require contractors to make a difficult decision; between declining to bid for multimillion dollar contracts, with the concomitant risk of unemployment for their employees, or violating their employees' right to select their own collective bargaining representative and abrogating their contractual obligations to Local 175." (*Id.* at p. 8).[5]

[5] This challenge was unsuccessful as noted by Justice Gray on page 2 of her decision in *The New York Independent Contractors Alliance Inc. v. Consolidated Edison Company of New, York, Inc.*, Index No. 708737/2017 (Sup. Ct. Queens Cnty., April 19, 2018). This decision was handed down after the hearing was closed. In that case the Court dismissed challenges to the Standard Terms and Conditions by the New York Independent Contractors Alliance for numerous reasons including, *res judicata*, lack of standing, no justiciable controversy and no private right of action. The decision is currently on appeal. Below is a link to the Court's decision. https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=J1IWzEt8Cn8njx0zNP0rzA==&system=prod.

E. Fall 2015 - Manhattan Pre-Bid Conference

In the fall of 2015 Messina attended a pre-bid conference for Con Edison's Manhattan contract that was scheduled to begin in 2016. Once again the issue of the Standard Terms & Conditions issue arose:

> Q . . . Was anything mentioned about the standard terms and conditions at this meeting?
>
> A Yes. Mike Perrino stood up and said that he just wanted to give everyone a head's up that the standard terms and conditions were going to be a requirement of the contract. And then he read them out -- read them out loud so that we knew what they were.

(513). After the meeting, representatives of Con Edison told Messina that Local 1010 had jurisdiction over the paving work to be performed. (98-99). Messina understood at that time that Local 175 workers could not perform the Con Edison work. (101).

Messina called Franco and Bedwell to advise him as to what had been said at the Manhattan pre-bid meeting. (513). They responded that Con Edison could not do what it was proposing to do. (513-514). Messina, testified he was concerned about the matter "because I knew I would be bidding my contracts in a year from then." (513).

F. Messina's Meetings and Discussions With Local 175 Representatives

As a result of what had been discussed at the Manhattan Pre-Bid conference, Messina would meet frequently with both Bedwell and Franco to discuss the situation.

> Q ...Did you have discussions with the union about this issue on a regular basis?
>
> A That's all we talked about for, you know, from the time we found -- it was after the pre-bid meeting -- it was after the actual bid of the Manhattan contract. The contractor who got the bid was using 1010 labor to do the work. And so every meeting that I had with Roland and/or Anthony was all about Con Edison, what they were -- you know, what they were doing and how the union was trying to fight it.
> ...

Q What did they tell you about Nico Paving?

A The union told me that they [Nico] were doing work with 1010 labor and that they don't have any 175 men anymore.

(514). Messina testified that he met with Bedwell and Franco regularly, and as time went on very frequently, *i.e.*, he met with Bedwell at least once or twice per week, and with Franco every week or every two weeks. (514-515). During these meetings, Local 175 advised Messina that it had filed lawsuits to try and stop Con Edison from enforcing the Standard Terms & Conditions. (517). It was also seeking to merge with a union that was affiliated with the B&CTC (*Id.*) but was unable to do so (392). At no time did Messina ever refuse to meet with Local 175. (515). Similarly, Franco testified that he met with Messina in 2016 and discussed the new Con Edison requirements. (365). Once the Con Edison issue with the Standard Terms & Conditions arose, Franco testified that he would meet more frequently with Messina. (379). He also testified that another contractor, Manna Construction had advised him that unless Manna signed with Local 1010, Local 731 and Local 15, it would not receive Con Edison contracts. (381).

G. Messina's Attempts to Convince Con Edison to Allow Tri-Messine to Continue Using Local 175 Labor

In the summer of 2016 Messina received a telephone call from Con Edison advising him that it was putting out the bids for the new contract for Brooklyn, Queens and the Bronx for work that was to begin in January 2017, and that in order to be awarded the contract Tri-Messine would have to be in compliance with the Standard Terms & Conditions.

Q ...What if anything did Con Ed tell you about the use of your Local 175 workers at that time?

A They told us that we had to use labor affiliated with the building trades, creating accounts or for the paperwork.

Q And who told you that?

> A I received a call from Michael DelBlasso, Michael Perrino and brought it up at the pre-bid meeting, which I believe was in October as well. And then, Michael DelBlasso and David Blaut called me to tell me specifically.

(92).

As noted, Tri-Messine had already received a one year extension of the Con Edison contract allowing it to continue its contract until the end of 2016. Nonetheless Messina offered to extend the contract at no increase for one additional year, through 2017, if Tri-Messine could continue to use the same Local 175 labor. This offer was rejected by Con Edison as was Tri-Messine's offer to extend the contract by one year with a 5% discount if it could continue to use the 175 Labor. (516-517, 199-200).

Messina also tried to convince Con Edison that the Standard Terms & Conditions should not apply to his company because B&CTC labor was not "available" to him.[6] When questioned by counsel for the Charging Party, he testified as follows:

> Q Did you advise Con Edison that you had a contract with Local 175?
>
> A Yes.
>
> Q And did you advise them that labor from a Union affiliated with the Building Trades Council was then currently not available to you due to your Union contract?
>
> A Yes, I did.
>
> Q And what was their response?
>
> A They told me that the other [paving] contractor in Manhattan had a contract with a labor union that was affiliated with Building Trades and I needed to do the same thing if I wanted to work with them.

(200; *see also* 519).

[6] Messina testified that when he first learned about the Standard Terms & Conditions requirement he spoke with Local 175 and others and thought that under the circumstances, B&CTC employees were not "available." (215). This obviously turned out not to be the case.

H. October 2016 Pre-Bid Meeting

In October 2016, Messina attended a pre-bid meeting for Con Edison's Brooklyn, Queens and Bronx paving contracts. Messina testified that at the meeting:

> They [David Blaut and Michael DelBasso of Con Edison] said that they wanted to make everyone aware that the standard terms condition[s] must be met and any of the unions must be affiliated with the Building and Construction Trades of Greater New York Council.

(520).

Similarly, when asked by the General Counsel what he had been told by Con Edison, Messina testified:

> Q Okay. And what precisely did the Con Ed representatives say about this provision and what it would mean for the contractors who were bidding on their work?
>
> A While I was at two separate pre-bid meetings it was mentioned at both of them, and it was -- they just wanted to point out that clause and that going forward any new contracts this would apply to. That you had to use unions having this jurisdiction over the work and they had to be affiliated with the Building and Construction Trades Council of Greater New York.

(98).

Messina immediately advised Local 175 of what transpired at this meeting. (521).

Mr. Messina's testimony as to what had occurred at the pre-bid meeting was confirmed by Michael Perrino, Section Manager for Con Edison. Mr. Perrino, who had been subpoenaed by the Charging Party (Local 175), testified that he told Mr. Messina that Tri-Messine had to abide by the Standard Terms & Conditions in order to get the Con Edison work.

> . . . the gist of the conversations were Al being concerned with conforming to the T's and C's of the contract because it had stated that use of the building trades and, you know, associated with the Building Construction Trades of Greater New York was in effect. And I had explained to him that, you know, with that that Tri-Messine had to conform with those requirements. And not only

> with the unions Building Trade Unions of Greater New York, but with that that had jurisdiction over that work.
>
> Q Did you identify from Mr. Messina what unions that would be?
>
> A I identified it as 1010 as the paver's union.
>
> * * * *
>
> Q Do you -- when -- do you recall advising Al Messina that he had to have a contract, a collective bargaining agreement with a union belonging to the Building and Construction Trades Council?
>
> A At the time when this -- when it was during this pre-award time period, yes.

(459-460, 465). As noted, Perrino specifically told Messina he needed to have a contract with Local 1010. (467). Perrino testified that once Con Edison's Standard Terms & Conditions were amended or clarified, no construction contracts were awarded to contractors who did not comply with the Standard Terms & Conditions. (473).[7] The Standard Terms and Conditions requirements, however, did not apply to *service* contracts. (479).

I. November 2016 Pre-Award Meeting

Tri-Messine won the bid for the Bronx, Queens and half of Brooklyn. (521). On or about November 3, 2016 Messina attended a pre-award meeting at which he was again advised that in order for the contract to actually be awarded to Tri-Messine, it needed to have collective bargaining agreements with unions affiliated with the B&CTC.

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[7] Perrino also testified that pursuant to his job duties as Section Manager for Con Edison, the Con Edison Purchasing Department would notify him of when contracts were going out to bid and when contracts were at the pre-award stage. (443). In the case of Tri-Messine:

> When it was coming close to pre-award phase of that contract, I was alerted by purchasing department that Tri-Messine was the low bidder of the contract. And so with that, I had to ask purchasing are they in compliance with the T's and C's of the construction contract because that's what it would fall under.

(458).

> Q Did the issue of Con Edison's standard terms and conditions come up at this November, 2016, pre-award meeting?
>
> A Yes.
>
> Q Was it discussed a little, a lot? How were --
>
> A That was the main topic, because they -- Con Edison knew that I had a contract [with Local 175], and they wanted to be sure before that I was awarded the work that I would be able to meet their requirement to use unions affiliated with the building trades.
>
> Q And just again, who was at this meeting?
>
> A David Blaut, Michael DelBlasso, Kevin Nolan. I'm not sure of the other Con Ed personnel.

(523). Moreover, on the form signed by Messina at the pre-award meeting it specifically stated that he was required to adhere to "Con Edison Standard Terms and Conditions for Construction Contracts dated 10/15/14." (GC Exhibit 9, p. 2). After this meeting, Messina advised Bedwell and Franco that Con Edison was not allowing Local 175 labor to perform work under the new contract. (535).

J. Messina's Subsequent Conversations With Con Edison

Based on the statements made at the November 2016 pre-award meeting, Messina understood that Tri-Messine would not receive the new 2017 Con Edison contract unless he could demonstrate that the work would be performed by B&CTC affiliated unions. Indeed, Messina testified that he was being pressured by Con Edison to ensure that the proper collective bargaining agreements were signed.

> ...When I left there, Con Edison made it -- you know, there was no uncertain about it, that it had to be done before they would award the actual work.
>
> And they were asking for updates, calling for updates once or twice a week. And I received calls at in December at a Christmas party at night 7:00 -- which I've never received a call in my life from Con Ed after 3:00 -- to ask me what was going on. I had to

> make -- they wanted to know right then and there, like was it going to get done, was I going to be able to perform the work using -- you know, following the standard terms and conditions.

(524). When asked about this on cross examination by counsel for the Charging Party, Messina testified:

> Q What exactly were they asking you?
>
> A They wanted to know if I was going to be able to be in compliance with the standard terms and conditions in order to be awarded the bid and if not, they were going to move on and award it to another contractor, the next lowest bidder.

(561).

The urgency of this situation could not have been greater. Indeed, Messina testified about what would occur if he did not meet the Standard Terms & Conditions:

> That if I didn't get it done they were going to not award me the contracts and I would go out of business, and have to lay off 65 employees, some eight of them, nine of them were my family.

(563).

This was confirmed by Local 175. Anthony Franco testified that during the middle of January he had a conversation with Messina:

> Well, we -- we had a conversation and it was, I think at that point Con Ed had told him unequivocally that you have to have a contract with Local 1010. And at that point he had no choice but to sign a contract with 1010 and he did.

(369).

In light of the clear directives to him by Con Edison that Tri-Messine must have contracts with unions affiliated with the B&CTC, Messina determined that he had no choice but to subcontract the work to another company that could perform the work consistent with the Standard Terms & Conditions. In November 2016, Callahan Paving Corporation was formed. (GC Exhibit 4). Callahan was owned in its entirety by Patricia Messina, Al Messina's wife.

(114). While Callahan is located at the same address as Tri-Messine, it pays its own rent. (49). Nevertheless the work was not subcontracted at that time; rather it remained with Local 175 for the remainder of 2016 and until March 3, 2017. (129). In fact, Messina was hoping that the work would not have to be subcontracted at all. (239-240).

K. Callahan's Meetings and Negotiations With Local 1010

In December 2016 Patricia Messina and her counsel met with representatives of Local 1010 to negotiate a collective bargaining agreement. (114). At the meeting Callahan sought to modify the provision in the draft contract presented to it that all new hires had to go through the 1010 hiring hall. (GC Exhibit 10). Messina testified that "I believe the attorney was trying to negotiate the contract so that she could have hired any employees that she wanted to." (115). Several e-mails were exchanged between counsel for Callahan and Local 1010 in which Callahan offered to pay employees more than the Local 1010 contract rate if Callahan could hire its employees directly. (114). This was rejected by Local 1010 as well as alternative proposals of just allowing Callahan to select some of the new hires. (GC Exhibit 10). On January 13, 2017 Patricia Messina signed the 1010 collective bargaining agreement. (GC Exhibit 11).

L. Counsel's Request to Meet in January 2017

In January of 2017 counsel for Local 175, Eric Chaikin contacted counsel for Tri-Messine and asked to have a meeting to discuss the issues relating to the Standard Terms & Conditions and their effect on Local 175 members. After a January 10, 2017 telephone discussion by counsel, Local 175 counsel sent an e-mail as follows:

> Mark: Thanks for speaking to me regarding Tri-Messine and the issues Local 175 is confronted with in regards to Consolidated Edison insisting on Tri-Messine having a collective agreement with Local 1010, LIUNA. . . .

(GC Exhibit 22). Counsel for Tri-Messine responded approximately one hour later:

> Let's meet to discuss issues related to the 175 contract. Can you come to my office in Garden City with your client on Friday [January 13] around 2:30 p.m.? I will have Al Messine [sic] here.

(*Id.*). The meeting was agreed to but the Union did not show up as scheduled. (120). Counsel for Tri-Messine sent an e-mail to Chaikin asking where he was (GC Exhibit 22) but there was no response to the e-mail (293). Thereafter Mr. Messina spoke with the Union who advised him that no meeting with counsel was necessary.

> I just spoke with Roland who contacted Anthony Franco and was told there is no need to have a meeting with the attorneys. I will meet with Anthony alone on Wednesday. I will call you after the meeting . . .

(*See* GC Exhibit 12).

M. Other Meetings With Local 175

Messina testified that he met with Mr. Franco the following Wednesday (January 18, 2017).[8] In fact he described a number of meetings he had or scheduled with Local 175 representatives and employees in January 2017 regarding the impact of Con Edison's implementation of the Standard Terms & Conditions.

> But we had one meeting with me, him [Anthony Franco] and Roland, which I believe was at the very beginning of January where I told them that I had to perform the work with 1010 and that I was going to be subcontracting out work the Callahan and that I was going to have a meeting with the men to let everyone know what was going on. And then I had a meeting with the men. And then I believe we met again, just me and him [Anthony Franco], at the diner. And that was on the 18th.

---

[8] Messina testified about how he repeatedly met with Local 175 as to the status of his dealings with Con Edison.

> . . . but we [Messina and Local 175] had spoken 20 times about the fact that Con Ed was enforcing the standard terms and conditions and I would have to use 1010 labor instead of 175

(127).

(528).[9] Messina advised Franco and Bedwell at the early January 2017 meeting that 1010 had rejected Callahan's request that it be permitted to use Tri-Messine employees when the new Con Edison contract would begin sometime in 2017, and that all 1010 employees would have to be hired through the hiring hall. (528). Accordingly, Messina told Franco and Bedwell that those employees who could not be placed in Local 15 (Operating Engineers) or Local 282 (Teamsters), would have to be laid off. (*Id.*). Messina then held a meeting with the union and all the employees in the Flushing truck yard in early/mid-January 2017:

> Q What did you tell them?
>
> A I told them that because of Con Edison's standard terms and conditions, that 175 wasn't qualified to do the work anymore, that I would have to subcontract the work to Callahan Paving, and that I would move whoever I could into 10 -- into Local 282. If they had a CDL or something like that, or if they operate a machine, I would put them in Local 15. And if not, I would -- I told them at the hiring hall clause in the contract that we try to negotiate it, but we weren't successful, and that I would do my best to hire them, but that they should go down if they were interested in, you know, coming to work for Callahan, they should go down to Local 1010 and try to gain membership.
>
> Q And you said the Union was present at this gathering?
>
> A Anthony and Roland, yes.
>
> Q What, if anything, was the -- did Anthony or Roland say anything?
>
> A Roland just told the guys that we all have to stick together and try to, you know, remain as a unit, and that they understood that I was being forced to do it, and that I was going to try to find work for as many men as I could, and they would try to find work for whoever couldn't get work at Callahan.

(529-530). Messina offered to, and did in fact, meet with each of the Local 175 employees in order to assist them in finding employment. (151-152, 530-531).

[9] These meetings were in addition to the meeting scheduled at Tri-Messine's counsel's office for which the union failed to appear without warning.

> Q Is it fair to say you spoke to all 44 of the Local 175 Tri-Messine employees about working at Callahan?
>
> A Yes.
>
> Q And you offered them positions at Callahan if you were able to get them into a different union, correct?
>
> A Correct.

(156). This was confirmed by Franco (395) and foreman Andrew Cinquemani (491). Messina also continued to meet with Franco and Bedwell in February and March of 2017. (532). On February 28, 2018 Messina sent a letter to Local 175 advising it that could no longer use its labor on Con Edison work because its members did not meet the Standard Terms & Conditions set forth by Con Edison, *i.e.*, "Local 175 does not meet the qualifications to perform the Consolidated Edison work" (GC Exhibit 17-a). In the letter, he again offered to discuss this with the union. There was no response to the letter.

N. Messina's Attempts to Save the Jobs of Tri-Messine's Employees

The new Con Edison contract went into effect on Monday, March 6, 2017. (531). On that day Tri-Messine's work was subcontracted to Callahan. (532). Of the approximately 44 regular full-time Local 175 employees working for Tri-Messine at the time, a number were immediately moved into other unions.

> Q . . . Do you remember approximately how many men you were able to move immediately into the Teamsters and Operating Engineers?
>
> A Six people were able to go into the Teamsters, and 11 people into the Operating Engineers.

(531). Eventually almost all of the individuals who were working with Tri-Messine who wanted to work for Callahan were hired by Callahan. (*See* GC Exhibit 16). Those that did not return either chose to remain with Local 175 (*i.e.*, worked elsewhere), had left the industry or were

unable to work. (*See* GC Exhibit 16). Individuals who moved to the other units either received the higher rate of pay provided by the particular collective bargaining agreement or continued to be paid at the higher Local 175 rate. For example, the individuals who worked as Operating Engineers received the substantially higher rate of pay as an operating engineer, while individuals who worked under the Local 282 Teamster contract or Local 1010 contract received the higher rate of pay provided under the Local 175 contract. (536-537).

In response to questioning by counsel for the Charging Party, Messina testified:

> Q So you actually gave not only your Tri-Messine former employees who had enjoyed higher rate[s] under the 175 contact, but you gave the higher rates of the 175 contract to Local 1010 employees employed by Callahan?
>
> A And also Local 282 employees because their rate was lower than the rate that everyone else was getting, yes.
>
> Q Like I said, you're amazing. Okay.

(231). This decision, ensuring that employees would not be paid less than what they had received at Tri-Messine, earned Messina the indisputable title of "mensch." (*See* 21, 378).

O. Local 175's Anti-Trust Challenge to the Standard Terms & Conditions

On February 27, 2017 Judge Kimba Wood issued her decision in *New York Indep. Contractors Alliance, Inc. and Local 175 of the United Plant & Prod. Workers Union v. Consol. Edison Co. of New York, Inc.*, 2017 U.S. Dist. Lexis 27381 (S.D.N.Y. Feb. 27, 2017) (Resp. Exhibit 3). In that case Local 175 had filed a complaint in February 2016 contending that the Standard Terms & Conditions violated federal and state antitrust law. In support of its claims the plaintiffs alleged as follows:

> 33. Under Con Edison's new Contract Terms, only contractors who have collective bargaining agreements with LIUNA Local 1010 can perform utility asphalt patch-paving work for Con Edison. <u>All other contractors are excluded from the market.</u>

34. On or about October 15, 2014, Con Edison formalized its new position by revising its standard Contract Terms. For the first time, the revised Contract Terms explicitly state that contractors must use workers belonging to unions affiliated with the BCTC, and therefore may not use workers affiliated with Local 175 and the contractors that employ them.

* * * *

39. In late December 2015, Phil Lentini, a member of Local 175, was specifically informed by Robert James, a LIUNA organizing representative, that LIUNA had made a deal with Con Edison to the effect that Con Edison would no longer award contracts to contractors affiliated with Local 175.

* * * *

41. In or around the fall of 2014, Con Edison contacted at least two NYICA-affiliated contractors who perform utility asphalt patch-paving work for Con Edison and are affiliated with Local 175. Con Edison informed those contractors that, while they would be allowed to finish their existing contracts with Con Edison, they would not be allowed to rebid for Con Edison contracts unless they signed collective bargaining agreements with LIUNA Local 1010. Since LIUNA Local 1010 will not enter into a collective bargaining relationship with any contractor that has a collective bargaining relationship with Local 175, Con Edison's new position bars Local 175 contractors from Con Edison's utility asphalt patch-paving contracts and other contracts. A LIUNA Local 1010 representative made similar threats

42. Further, a Local 175 contractor was informed by Con Edison that it was the low bidder for a contract for Con Edison, but to receive the contract, it would have to sign a collective bargaining agreement with a union that belonged to the BCTC.

* * * *

45. In or about October 2014, a representative of Tri-Messine Construction ("Tri- Messine") was contacted by a Con Edison representative. The Con Edison representative informed Tri-Messine that it would be permitted to finish its existing contracts with Con Edison, but Tri-Messine would not be able to rebid those contracts unless it signed a collective bargaining agreement with LIUNA Local 1010.

* * * *

49. . . . Con Edison's labor relations representative told Mr. Cardino [of Mana Construction] that Local 175 was no longer recognized by Con Edison, and that Mana would have to sign an agreement with LIUNA Local 1010 and LIUNA Local 731.

* * * *

51. In October 2014, Mr. Petranico told a representative of Local 175 that Mr. Petranico had been called to Con Edison's main office and was told that, while he would be allowed to finish his existing contracts with Con Edison, Con Edison would not allow him to rebid contracts unless he signed with LIUNA Local 1010 because it is the only member of the BCTC that performs asphalt paving.

* * * *

57. Under Con Edison's Contract Terms, Citywide may not use Local 175 members to perform work for Con Edison. Thus, as a result of Con Edison's agreement with LIUNA and LIUNA Local 1010, members of Local 175 will be deprived of work they otherwise would have performed.

* * * *

66. . . . Similarly, Local 175 members will be forced either to forego utility asphalt patch-paving work or leave Local 175 and join LIUNA Local 1010.

* * * *

72. Local 175 workers have been directly injured as a result of Con Edison's anticompetitive conduct, and have been threatened with continuing injury. They have lost work from Con Edison contracts that they have traditionally performed, and have been threatened with further loss of work.

* * * *

80. Local 175 workers have been directly injured as a result of Con Edison's conspiracy to monopolize the market for utility asphalt patch-paving in New York City, and have been threatened with continuing injury. They have lost work from Con Edison that they have traditionally performed, and have been threatened with further loss of work.

(Resp. Exhibit 2, emphasis added).

In her Opinion and Order Judge Wood found no antitrust violation. (*See* Resp. Exhibit 3). She concluded that the Plaintiffs had failed to demonstrate that Con Edison had entered into an agreement with anyone on this issue. (*Id.*). Moreover, she held there would likely be no impact on competition as Local 175 contractors would only be obligated to make payments under their contracts until the end of its term, and therefore, the additional cost would be temporary. (*Id.*). Accordingly the Court dismissed the complaint in its entirety. (*Id.*).

P. Termination of the 2014-2017 Local 175 Collective Bargaining Agreement

The Local 175 collective bargaining agreement expired on June 30, 2017. (GC Exhibit 6). Article IV of the contract (entitled Term-Renewal) provided as follows:

> This Agreement shall continue in effect until and including June 30, 2017, and during each year thereafter unless on or before the fifteenth (15th) day of March 2017, or on or before the fifteenth (15th) day of March of any year thereafter, written notice of termination or proposed changes shall have been served by either party on the other party.
>
> In the event that written notice shall have been served, an agreement supplemental hereto, embodying such changes agreed upon, shall be drawn up and signed by June 30th of the year in which the notice shall have been served.

(*Id.*, emphasis added).

On March 13, 2017, Tri-Messine sent a letter via overnight mail to Local 175 advising it that it was *terminating* its agreement on June 30, 2017. (*See* GC Exhibit 24(b)). (*See also* GC Exhibit 24(a) ("I did advise you that on March 13, 2017, in accordance with Article IV of the agreement, Tri-Messine elected to terminate the contract effective June 30, 2017")). Previously, on February 28, 2017, Tri-Messine had withdrawn from NYICA, the employer association that had negotiated the Local 175 contract on behalf of its members. (GC Exhibits 17-a and 17-b). Counsel for Local 175 testified that he understood that Tri-Messine had terminated the agreement effective June 30, 2017 (299) and "were not intending to renew" after that date (285).

There was no immediate response to the March 13, 2017 termination letter. However, on March 27, 2017 counsel for Local 175 sent an e-mail to counsel to Tri-Messine asking if it could speak "regarding a variety of issues stemming from allegations of alter ego and joint employer." Counsel for Tri-Messine expressed a willingness to speak but there was no follow up from Local 175. (Resp. Exhibit 4).

Q. Tri-Messine's Willingness to Engage in Effects Bargaining

In *May* 2017, counsel for Local 175 contacted counsel for Tri-Messine to provide dates to negotiate a new collective bargaining agreement and to discuss the effects of the termination of employees. (GC Exhibit 24-a). On May 18, 2017, counsel for Tri-Messine responded by noting that Tri-Messine had already announced that it had terminated its contract effective June 30, 2017. (GC Exhibit 24-b). Moreover, Tri-Messine had no employees at the time as all of the work was being performed by Callahan which had a collective bargaining agreement with Local 1010. Despite the passage of several months from when Local 175 had become aware of the necessary subcontracting decision and efforts by Tri-Messine to ensure job stability for its former employees, counsel for Tri-Messine offered to meet to discuss the impact or effects of its decision to subcontract, but no response was received from Local 175 (GC Exhibit 24-a) and Local 175 admitted it never followed up on Tri-Messine's offer to meet (339).

R. Filing/Dismissal of Unfair Labor Practice Charges

On or about March 7, 2017 Local 175 filed charge 29-CA-194470 with the Board alleging violations of § 8(a)(1), (2), (3) and (5) of the National Labor Relations Act against Con Edison Company of New York, Inc. and its "joint employer" Tri-Messine Construction Company, Inc. and its "alter ego" Callahan Paving Corp.:

> Within the last 6 months, the above-named employers, by and through their agents and representatives, have violated the above-referenced sections of the act by (i) repudiating a collective

> bargaining agreement with the Union; (ii) discriminating in regard to the hire and tenure of employment, and other terms and conditions of employment, so as to discourage or encourage membership in a labor organization; (iii) dominating and/or interfering with the formation and administration of Local 175, and contributing to the financial and other support of another labor organization, to wit, Local Union 1010; and (iv) failing to bargain the effects of their actions with Local 175. By these and other acts, the Employers have intimidated, coerced, and restrained employees in the exercise of their rights guaranteed by Section 7 of the Act.

(GC Exhibit 1(a). On April 28, 2017 the Regional Director:

> approved the withdrawal of the allegation that Con Ed and Tri-Messine Callahan violated Section 8(a)(1) and (3) of the National Labor Relations Act by terminating employees because of their membership in Local 175, United Plant and Production Workers, "Local 175".

(Appendix A). Thus, Con Edison was no longer part of this matter. Also, on August 30, 2017 the Regional Director:

> approved the withdrawal of the portion of the charge that alleges that the Employer violated the Act by domination and/or interfering with the formation and administration of Local 175, and contribution to the financial support of another labor organization.

(Appendix B).

On September 14, 2017, Local 175 filed an amended charge 29-CA-194470 alleging violations of § 8(a)(1), (2), and (5) of the Act against Tri-Messine Construction Company, Inc. and Callahan Paving Corp.:[10]

> On a date within the last 6 months, the above referenced Employer, by and through its offices, agents, employees and directors, has violated the above-referenced sections of the Act by (i) unlawfully recognizing LIUNA Local 1010 and executing a collective bargaining agreement with LIUNA Local 1010; (ii) repudiating its collective bargaining agreement with Local 175; (iii) refusing to recognize Local 175 as the exclusive bargaining representative for certain of its employees; (iv) failing to bargain over the layoff of

[10] The amended charge made no reference to § 8(a)(3) of the Act.

> its entire workforce; and (v) failing to bargain the effects of their actions with Local 175. By these and other acts, the Employer has intimidated, restrained and coerced employees in the exercise of their rights under Section 7 of the Act.

(GC Exhibit 1(c)).

In addition, on September 14, 2017, Local 175 filed charge No. 29-CA-206246 under § 8(a)(1) and (3) of the Act against Tri-Messine which stated as follows:

> On a date within the last 6 months, the above-referenced Employer, by and through its offices, agents, employees and directors, has violated the above-referenced sections of the Act by terminating bargaining unit employees because of their support for, and membership in, Local 175. By these and other acts, the Employer has intimidated, coerced and restrained employees in their exercise of their rights under the Act.

(GC Exhibit 1(e)).

On October 2, 2017 Local 175 filed Charge 29-CB-207278 against Local 1010 alleging violations of § 8(b)(1) and (2) of the Act. (Appendix C). This included a claim that Local 1010 had prematurely executed a collective bargaining agreement with Callahan. (*Id.*). This Regional Director approved the withdrawal of this charge on December 18, 2017. (*See* Appendix C).

S. Complaint and Hearing

On or about December 27, 2017 the General Counsel issued its complaint in this matter. Respondents filed their answer on or about January 3, 2018. On April, 10, 11 and 12, 2018 testimony was taken in this matter before Administrative Law Judge Jeffrey Gardner. Briefs were scheduled to be filed by May 17, 2018 but the parties requested to extend the filing until May 31, 2018, and their request was approved by the Board.

ARGUMENT

POINT I

THE DECISION BY TRI-MESSINE TO SUBCONTRACT WORK TO CALLAHAN WAS ENTIRELY LAWFUL

The General Counsel suggests that Callahan and Tri-Messine share common facts suggesting that they are alter egos. This, however, ignores the fundamental issue at hand, *i.e.*, that Tri-Messine could not, as of March 6, 2017 continue to perform the Con Edison work using Local 175 labor. Tri-Messine was not seeking to avoid its obligation under any contract; rather, the work itself no longer belonged to Local 175.

A. As of March 6, 2017 Local 175 Employees Were Not Qualified to Perform Con Edison Work

Article VIII, Section 2 of the 2014-2017 collective bargaining agreement provides:

> This Agreement is applicable to qualified employees who are employed under the classification as set forth in Article IX, Section 6 of the Agreement.

(GC Exhibit 6, p. 9, emphasis added). Local 175 is not and has never been affiliated with the B&CTC. Once Con Edison determined that under its Standard Terms & Conditions only B&CTC labor having jurisdiction could perform Con Edison work, Local 175 had no right to perform this work. Therefore, Tri-Messine's Local 175 workforce was not qualified to perform the work for Con Edison.

Indeed, General Counsel asked Messina why he was using Callahan workers to perform the Con Edison work:

> Q Why not Tri-Messine's workers?
>
> A Tri-Messine is not currently able to perform any work, because the union that we have a contract with, Con Edison rules that they're not qualified to perform paving work for that.

(52).

Similarly, Messina testified as follows:

> Q . . . The reason that Callahan had to perform the work was because Tri-Messine had a contract with 175, correct?
>
> A The work had to be performed with the Union that affiliated with the building trades, and 175 was not so they weren't qualified. Per Con Edison, they weren't qualified to perform the work and all that.

(139). *See also* Tr. at 502 ("Con Edison said that the union had to be affiliated with the Building Trades of Greater New York Council. And 175 is not.").

In *American Flint Glass Workers' Union*, 133 NLRB 296, 304 (1961), the Board stated:

> In the interpretation of a contract words are to be given their ordinary meaning unless the circumstances indicate that a different construction has been adopted by the parties. Restatement of Contracts, 235; 12 American Jurisprudence, Contracts, 236. And where the words of an integrated written agreement are unambiguous, their meaning is to be determined from the agreement itself.

See also Silver State Disposal Service, 326 NLRB 84, 86 (1998) ("in interpreting contractual language, words must be given their 'ordinary and reasonable meaning'") *quoting Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3d Cir. 1981). Further, when construing the language of an agreement "no part of a contract's language should be construed in such a way as to be superfluous." *CVS & Local 338 Retail*, 2016 NLRB LEXIS 416, at *6 (June 7, 2016), *quoting* Restatement (Second) of Contracts § 203(a).

The word "qualified" is defined as follows:

> . . . having complied with the specific requirements or precedent conditions (as for an office or employment): **eligible** (*see* https://www.merriam-webster.com/dictionary/qualified);
>
> . . . Competent or knowledgeable to do something; **capable** (*see* https://en.oxforddictionaries.com/definition/qualified);
>
> **having met conditions or requirements set** (*see* https://www.collinsdictionary.com/us/dictionary/english/qualified)

(emphasis in bold).[11]

Clearly, as of March 6, 2017 workers performing work under the Local 175 agreement were neither "eligible," "capable" nor able to meet "the conditions or requirements" necessary to perform Con Edison work. Applying the agreement to any individual would in effect, render the word "qualified" meaningless or superfluous and contrary to cardinal rules of contract construction.

Moreover, courts have routinely held that a person who is unable to work is not considered to be "qualified." *See O'Connell v. Potter*, 274 F. App'x 518, 519, 2008 U.S. App. LEXIS 9016, at *1 (9th Cir. 2008) ("because she was unable to work, she could not perform her employment duties and was not a qualified individual"*);* *Holowecki v. Fed. Express Corp.*, 644 F. Supp. 2d 338, 359 (S.D.N.Y. 2009) ("the undisputed evidence shows that Robertson and his doctor both contended that he was 'unable to work,' thus indicating that he was not qualified for a courier position"); *Talmadge v. Stamford Hosp.*, 2013 U.S. Dist. LEXIS 76404 (D. Conn. May 29, 2013) ("plaintiff was not qualified for the OR nurse position because he was prohibited from working in an operating room or accessing narcotics until mid-November"); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) (finding that Plaintiff was not qualified for her position because she was not released for work by her doctor and was incapable of coming to work); *McCoy v. Pa. Power & Light Co.*, 933 F. Supp. 438, 443 (M.D. Pa. 1996) (failure to maintain security clearance "renders an employee ineligible, *i.e.*, not qualified, to work").

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[11] Significantly the Merriam Webster Dictionary defines the word "unable" as follows:

> not able: incapable: such as
> a : unqualified, incompetent . . .

https://www.merriam-webster.com/dictionary/unable (emphasis added),

In *Plumbers & Pipefitters Local 525*, 266 NLRB 515 (1983), a dispute arose as to whether Local 501 of the Operating Engineers or Plumbers and Pipefitters Local 525 would perform certain work. The Board concluded that Local 525 should perform the work because Local 501 workers were not qualified.

> Finally, the record shows that Local 501 has no source of journeyman plumbers other than those who "walk in" off the street. Under these circumstances, Local 501 has not established that it would meet the Employer's fluctuating need for qualified employees. Thus, the Employer would be unable to ensure meeting its obligations under its contract with the Stardust Hotel if it utilized employees represented by Local 501.

Id. at 518.

As in *Plumbers & Pipefitters*, the Con Edison work could not be performed by Local 175 employees based on their lack of qualifications. Local 175 could not supply workers who would be permitted to perform the work. As Messina repeatedly testified "[the work] couldn't begin because we weren't being awarded the contract unless we showed Con Edison that we had signed contracts with unions that were affiliated with the building trades." (128). Therefore, assigning the work to Local 1010 was entirely lawful. *See also Trs. of the N.Y. City v. Tappan Zee Constructors LLC*, 2015 U.S. Dist. LEXIS 163726 (S.D.N.Y. Nov. 30, 2015) (employer could use non-bargaining unit employees to perform work and was under no obligation to contribute to union pension and welfare funds when union was unable to supply qualified employees to perform unit work); *Canterbury Educational Serv., Inc.*, 316 NLRB 253, 255 (1995) (employee unable to work deemed not qualified).

B. Tri-Messine Was Facing an Economic Exigency

Moreover, the decision to subcontract was not unlawful as there clearly was an economic exigency. Had Tri-Messine not subcontracted the work, all of the Local 175 employees (and all of the other union and non-union employees) would have lost their jobs.

> Q Well, why did you put in a bid for the work if they were telling you had to have a contract with an organization that your union was not affiliated with?
>
> A If I didn't perform Con Edison work, I'd be out of business and that I'd have to lay off full 65 employees. I'd be out of business.

(521). Indeed, even the union understood the exigency. Anthony Franco testified that "I mean, you know, I couldn't expect the guy to lose his business." (393).

"[A]n employer may act unilaterally if faced with an economic exigency justifying the change." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.D.C. 2000). *See also Visiting Nurse Servs., Inc. v. NLRB*, 177 F.3d 52, 56 (1st Cir. 1999); *RBE Elecs. of S.D., Inc.*, 320 NLRB 80, 81 (1995). An economic exigency must be a "heavy burden" and must require prompt implementation. *RBE Elecs. of S.D., Inc.*, 320 NLRB at 81. The employer must additionally demonstrate that "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." *Id.* at 82 (footnote omitted).

It is hard to imagine a more serious economic exigency than that faced by Tri-Messine at the end of 2016 and beginning of 2017. Tri-Messine had the options of (a) not bidding or performing the Con Edison work (97% if its business in 2016) (564), thus laying everyone off and going out of business because of circumstances completely out of its control; or (b) subcontracting the work so that it could preserve the jobs for most of its workers. Its future viability was at stake. Under these circumstances, there can be no finding of an unlawful unilateral change. Indeed, even if the work of Callahan and Tri-Messine are considered to be similar, the fact remains that there was an economic exigency that left Tri-Messine no option other than to subcontract the work to allow labor acceptable to Con Edison to perform the work. These were clearly "extraordinary events which are an unforeseen occurrence, having a major

economic effect requiring the company to take immediate action...[.]" *RBE Electronics of S.D.*, 320 NLRB at 81. Moreover, the Union admitted that the decision was beyond anyone's control.[12]

> Q This was no fault of [Messina's], correct?
>
> A No.
>
> Q There wasn't anything he could do to stop it; is that fair to say?
>
> A Well, he could've taken all the men and put them -- kept them and had -- for Con Ed, then he would've lost his contract, so.
>
> Q And then all –
>
> A Would -- would not have made sense for him to do that.
>
> * * * *
>
> Q In other words, what Con Ed was doing was out of Al's control; isn't that right?
>
> A Yes.
>
> Q It was out of the Union's control, too. You didn't have any control over Con Ed?
>
> A No. No. We did not.

---

[12] In *Central Rufina*, 161 NLRB 696, 699-700 (1966), the Board upheld the employer's decision to contract out work due to mechanical difficulties with its equipment. According to the Board:

> [T]he Respondent in the instant case was not seeking to gain an economic advantage at the expense of its employees or of the Union. Rather, the Respondent was faced not only with the inability to operate efficiently because of matters beyond its control, but, also, in view of the curtailment of its bank credit on which the Respondent's operation was completely dependent, with the inability to operate at all. It would appear, therefore, that in the circumstances of this case, the factors which led to the Respondent's decisions to subcontract and to terminate its grinding are not "peculiarly suitable for resolution within the collective bargaining framework."

Id. at 699-700 *citing Fibreboard Paper Products Corp.*, 379 U.S. 203, 213-214 (1964). *See also National Terminal Baking Corp.*, 190 NLRB 465, 466 (1971) (employer unilaterally ceased operations after two of its delivery trucks were stolen in one week and it lacked the funds to continue operations).

Q But when you met with Al, you both were hoping that this situation could be avoided, correct?

A Correct.

(390, 391).

During the hearing, the General Counsel argued that "the potential loss of a customer does not excuse an employer's obligation to refrain from making unilateral changes to employees' terms and conditions of employment." (18). In support of its position it cited the Board's decision in *Farina Corp.*, 310 NLRB 318 (1993). *Farina*, however, is inapposite. There, *without any advance notice*, the employer laid off five workers shortly after the union had won a representation election. The union demanded that the employer bargain over the decision to layoff and the impact of the decision, but the employer refused. In addition, the employer's argument that it had suffered a loss of customers was found not to be a defense to its failure to bargain. "Loss of a customer account does not constitute a compelling economic consideration justifying a failure to bargain." *Id.* at 321. Unlike *Farina*, however, Tri-Messine advised the union of the anticipated layoffs two months *before* they actually took place. In early January 2017 Messina met with Franco and Bedwell in a diner to advise him that 1010 was requiring all of that union's workers to come through the hiring hall. (528). He then met with the union and all of the workers at the Flushing Truck Yard in January 2017 to advise them that the layoff was based on Con Edison's new requirements. (530). The layoffs did not occur until March 2017. (491). He then agreed to meet with Local 175 and its representatives at his attorney's office but Local 175 failed to show and claimed it did not want to meet with any attorneys. (GC Exhibits 12, 22). Afterwards Messina met with Franco at the diner to again discuss the situation. (GC Exhibit 12; 527). Moreover, not only was Local 175 given advance notice of the situation, it admittedly never asked to bargain. (371, 393, 402).

Further, in *Farina*, there was nothing close to the urgency being experienced by Tri-Messine. The employer in *Farina* was continuing to operate and even made a profit after the layoffs. Here, if the subcontract to Callahan did not occur, it is undeniable that the entire workforce would have been laid off without the hope of being rehired. For all intents and purposes Con Edison was Tri-Messine's *entire* business. Accordingly the situation here was far more drastic than in *Farina*, or any other case finding a downturn in business insufficient to suspend the duty to bargain.

C. The Doctrine of Impossibility Allowed Tri-Messine to Subcontract its Work to Callahan

The testimony of Al Messina was that either a union affiliated with the B&CTC perform Con Edison work, or he would lose the entire Con Edison contract and his business. Franco understood that Messina's entire business could be lost. (393). Indeed, Messina was doing everything to try and keep the work with Local 175, but was simply unable to do so.

> A Yes, 175 told me they were working on that [trying to change Con Edison's position], and they were also working on something that might let them merge or join with a union that was affiliated with the building trades.
>
> Q Now what did you think, if anything, would happen if 175 was successful in those efforts?
>
> A Well, if Con Edison would have allowed -- well, if 175 would have been able to join, be affiliated with the building trades, we could have used them to perform Con Edison's work, and that's why we waited till February 28th to actually send out the letters, as opposed to sending them out at the beginning.

(233). In an exchange with Judge Gardner, Messina again reiterated his desire to keep Local 175.

> Yeah. I was meeting with Roland and Anthony back and forth once a week to -- they were keeping me informed on how things were going with their various efforts with Con Edison, and then also that they might be able to merge, or become one with a union that was a member of the building trades. So we waited till -- to formally, like, send the letter, even though they, you know, we told them

> way in advance what was going on. But we formally sent the letter, we waited until the last minute in case they were able to pull something off.
>
> JUDGE GARDNER: If they pulled something off, so to speak, on February 21st, right, a week sooner, did you have a plan for what would happen in that case?
>
> THE WITNESS: We wouldn't have had to subcontract the work out.
>
> JUDGE GARDNER: And Tri-Messine would have just done the work with its existing employees?
>
> THE WITNESS: Yes.
>
> JUDGE GARDNER: And what would have become of Callahan, do you know?
>
> THE WITNESS: Nothing.

(239-240). Even counsel for Local 175 admitted that Messina would not have subcontracted the work if he absolutely did not have to do so.

> Q Do you think Mr. Messina would have subcontracted all of the work out if he could have had the 175 people do it in the first place?
>
> A I'm sure he wouldn't.

(320).

Under these circumstances performing the work with Local 175 labor would have been impossible.

The doctrine of impossibility of performance has long been recognized by the Board. For example, in *Associated Musicians of Greater New York*, 176 NLRB 365 (1969), the union advised the employer that if it used three individuals who were not in good standing, any union workers who performed with them would be brought up on charges. As a result many union workers refused to perform with these individuals and the employer eventually declined to use

any of the three members who were not in good standing. The General Counsel claimed that this was a violation of the Act but the Board disagreed.

> In the law of contracts, the well established doctrine of impossibility of performance relieves an obligor of his contractual liability if unforeseen circumstances render performance impossible. Although this is not a contract question, we are persuaded that the law of labor relations should provide an employer with some equivalent measure of flexibility in such extreme and unusual circumstances as are presented here. Thus, because of the failure of Miller, Arthur, and Bass to retain good standing in the Union, Carroll was placed in the position of having to adopt one of two alternative courses of conduct: he would have to find replacements either for Miller, Arthur, and Bass, or for Anelli, Cardelli, and, in all probability, the remainder of the complement. Carroll chose the former alternative; there is no showing that the other course was, as a practical matter, open to him. We are unwilling to hold on these facts that his conduct violated the Act.

See 176 NLRB at 367.

The situation here is far more exigent than in *Associated Musicians*. Here Tri-Messine literally had no choice but to subcontract is its work. It could either close its business and layoff all of its workers or subcontract the work to Callahan, saving the Con Edison contract and the jobs of dozens of its employees. It cannot be faulted for these actions. To the contrary, its actions should be applauded given the fact that virtually all of the workers were ultimately hired by Callahan. *See also Freightliners Equip. Co.*, 120 NLRB 1614, 1624 (1958) ("I also have no question but that the 1950 contract became a nullity and was impossible of performance upon Richards' receivership and the layoff of his drivers by the receiver and during the subsequent period of several years during which Richards' Scranton business was defunct and he had no employee drivers there."); *Bricklayers Local No. 1*, 194 NLRB 649, 651 n.7 (1971) ("[a]s stated in 6 *Corbin on Contracts*, chap. 74, § 1321: 'If the specific performance promised by a contractor becomes impossible, either by the destruction of the specific subject matter, the death

of a necessary person, *or the nonexistence of the specifically contemplated means of performance,* his duty is discharged--unless the parties expressed a contrary intention.'") (emphasis in original).

D. Callahan Did Not Discriminate in the Hiring of Any Employees

The necessary elements of a § 8(a)(3) violation include: union or other protected concerted activity by employees, employer knowledge of the activity, and a connection between the union animus by the employer and the adverse employment action. *See, e.g., Consol. Bus Transit*, 350 NLRB 1064, 1065 (2007); *Desert Springs Hosp. Med. Ctr.*, 352 NLRB 112 (2008); *Am. Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002). Here there is no evidence of any protected activity by Tri-Messine's employees that led to any decision not to hire.

Once Con Edison advised Tri-Messine that it could not perform the work using Local 175 labor, the work was subcontracted to Callahan who in turn used labor that was approved by Con Edison. Local 1010, insisted, however that all employees be hired through the 1010 hiring hall. In fact, if Callahan failed to follow these procedures, it could be subject to stiff penalties. (*See* GC Exhibit 11 at pp. 5-6). Callahan initially offered Local 1010 to pay its employees more than 1010 had even requested if it could use the existing Tri-Messine work force. Local 1010 refused. Callahan then made additional proposals but these too were rejected by Local 1010. (*See* GC Exhibit 10). Callahan did everything possible to try and persuade Local 1010 to allow existing Local 175 Tri-Messine employees to move directly from Tri-Messine to Callahan. Seventeen workers were immediately moved to Local 282 and Local 15. (GC Exhibit 16). These individuals were either paid the significantly higher Local 15 wage rate, or if the employee moved to Local 282, they continued to be paid the higher Local 175 wage rate. Other employees that went to the Local 1010 and were eventually hired by Callahan over the next several months were also paid the higher Local 175 rate of pay. To suggest there was animus here against

individuals Messina socialized with, considered to be his friends, and who he did everything possible to find union jobs for, is completely without merit.

POINT II

TRI-MESSINE AND CALLAHAN ARE NOT ALTER EGOS

"[T]he application of the alter ego doctrine is essentially an equitable one to be applied in a given case at the discretion of the trier of the facts." *Joe Costa Trucking*, 238 NLRB 1516, 1523 (1979). "To determine whether two employers are alter egos, the Board considers several factors, including whether they have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers." *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73, at p. 4 (2016). Most relevant to this case, however, "the Board also considers whether the new entity was formed to evade responsibilities under the Act." *Deer Creek Elec., Inc.*, 362 NLRB No. 171 (2015).

> The focus of the alter ego doctrine . . . is on "the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations." [*Truck Drivers Local Union No. 807 v. Regional Import & Export Trucking Co.*, 944 F.2d 1037, 1046 (2d Cir. 1991)] *(quoting Carpenters Local Union No. 1846 v. Pratt- Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), cert. denied, 464 U.S. 932, 78 L. Ed. 2d 305, 104 S. Ct. 335 (1983)); *see also Goodman Piping*, 741 F.2d at 12 (evidence of "anti-union animus or an intent to evade union obligations . . . may be 'germane'") (citation omitted).

Lihli Fashions Corp. v. NLRB, 80 F.3d 743, 748 (2d Cir. 1996) (emphasis added). *See also Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 508 (5th Cir. 1982) (emphasis added) ("[t]he focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations"); *Elec. Data Systems Corp.*, 305 NLRB 219 (1991), *enforced in pertinent part*, 985 F.2d 801 (5th Cir. 1993).

In *Massachusetts Carpenters Cent. Collection Agency v. A.A. Building Erectors, Inc.*, 343 F.3d 18 (1st Cir. 2003), Kalwall Corp., a designer, manufacturer and seller of fenestration systems set up A.A. Building to perform its union installation work. A.A. and Kalwall had the same owners, worked out of the same address and had the same phone and fax numbers. Kalwall continued to subcontract some of its work to non-union installers. A.A.'s union contract, however, required that all of its work be performed by union labor. Accordingly the Funds sued A.A. and its alleged alter ego Kalwall for unpaid contributions. The First Circuit affirmed the District Court's granting of summary judgment finding that the two companies were not alter egos despite the fact that they were "joined at the hip." *Id.* at 20.

> We need not disagree with the premise of this assertion in order to reject plaintiffs' argument that the alter ego doctrine should apply in this instance. The doctrine is not a formalistic mechanism for reflexively regarding distinct jural entities as legally interchangeable whenever the entities' relationship is marked by a sufficient number of the doctrine's characteristic criteria -- *e.g.*, continuity of ownership between the corporations, management overlap, similarity of business purpose, evidence that the nonunion entity was created to avoid an obligation in a collective bargaining agreement. *See Hospital San Rafael*, 42 F.3d at 50. Rather, the doctrine is a tool to be employed when the corporate shield, if respected, would inequitably prevent a party from receiving what is otherwise due and owing from the person or persons who have created the shield.

Id. at 21-22 (emphasis added). In finding no alter ego status, the Court focused on two factors:

> First, there is no evidence that A.A. Building deceived the UBC about its structure, ownership, relationship with Kalwall, or the fact that Kalwall regularly subcontracts with nonunionized installers. . .
>
> Second, and relatedly, there is absolutely no indication that the relationship between A.A. Building and Kalwall has changed over the years or has caused the UBC to receive less than that for which it bargained. This matters because, in all the cases involving application of the labor law alter ego doctrine to which plaintiffs have drawn our attention (or which we have read on our own), the

> union membership with rights under a collective bargaining agreement has been somehow worse off following some change in the structure or operations of the employer with whom the collective bargaining agreement was negotiated. Here, plaintiffs have provided us with no reason to apply the doctrine other than pointing out that, unbeknownst to them until recently, many of the criteria necessary for an alter ego finding characterize the relationship between Kalwall and A.A. Building. As we have explained, this is not enough.

Id. at 22 (emphasis added). *Accord, Resilient Floor Covering Pension Fund v. M & M Installation, Inc.*, 651 F. Supp. 2d 1057, 1063 (N.D. Cal. 2009).

In this case it would be grossly inequitable to apply the alter ego doctrine because:

- The Con Edison work could not continue to be performed by Tri-Messine;
- There was no deception by Tri-Messine or attempt to avoid its legal obligations; and
- It cannot be claimed that the subcontracting of work to Callahan made any of the employees worse off; to the contrary, the subcontracting saved their jobs.

A. There Was No Possibility That Local 175 Members Could Continue To Perform The Work After March 6, 2017

"[O]perational continuity is a factor in alter ego as well as successorship cases." *Cadet Constr. Co.*, 287 NLRB 564, 564 n.3 (1987). The General Counsel's assertion that Tri-Messine and Callahan are alter egos is based on an erroneous assumption that the Con Edison work previously performed by Local 175 could *continue* to be performed by its members even after the Standard Terms & Conditions were amended or clarified. Con Edison directed that only B&CTC affiliate unions could perform this work, and therefore Local 175 could no longer *continue* to perform the work. It was no longer "its work" when Tri-Messine lawfully subcontracted it to Callahan, a company solely owned by Patricia Messina (someone who had no interest in Tri-Messine), so that the work could in fact get done by qualified employees. *See Redway Carriers*, 202 NLRB 938, 941 (1973) ("the absence of any significant carryover in

customers . . . indicate an extinguishment of the continuity of [the previous employer's] enterprise"); *Local 812 GIPA v. Canada Dry Bottling Co.*, 2000 U.S. Dist. LEXIS 18712, at *11 (S.D.N.Y. Dec. 29, 2000) (no sham transaction or alter ego status found; "Even if Canada Dry and Coors New York were a single entity, it is undisputed that Coors Colorado was going to stop using Canada Dry for distribution in the New York area. This is a legitimate business purpose justifying the formation of MBD with Manhattan Beer, an existing reputable organization, for the continued distributing of Coors . . . In light of the evidence that the threatened loss of Coors Colorado's business was a motivating factor in the formation of MBD, and the persuasiveness with the NLRB the perceived loss of business had, the Court does not find any evidence of this transaction being a sham to circumvent the collective bargaining agreement"). Indeed, unlike any cases the General Counsel will cite in this matter, it is indisputable that all of the work now performed by the alleged alter ego could not have been performed by Tri-Messine.

B. There Was No Attempt By Tri-Messine To (A) Disguise The Subcontracting Of Work To Callahan Or (B) Avoid The Local 175 Agreement Or Its Responsibilities Under The Act

In making an alter-ego determination, the Board also considers "whether the purpose behind the creation of the suspected alter ego was to evade another employer's responsibilities under the Act." *Island Architectural Woodwork, Inc., supra*, at p. 4. *See also I.W.G., Inc.*, 1999 NLRB LEXIS 488, at *9 (July 9, 1999) *quoting Watt Elec. Co.*, 273 NLRB 655, 658 (1984) (in determining alter ego status, Board considers whether "the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act"); *Advance Elec.*, 268 NLRB 1001, 1002 (1984) *quoting Fugazy Cont'l Corp.*, 265 NLRB 1301 (1982) ("[o]ther factors which must be considered in determining whether an alter ego status is present in a given case include 'whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead its purpose was to evade responsibilities

under the Act'"). *See Hotel & Rest. Emps. Local 274 (Warwick Caterers)*, 282 NLRB 939, 943 (1987) *citing Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d at 507.

"Unlawful motivation is an additional factor frequently considered in determining whether alter ego status exists." *M&J Supply Co., Inc.*, 300 NLRB 444, 449, (1990) *citing Gilroy Sheet Metal*, 280 NLRB No. 121 fn. 1 (June 24, 1984); *Perma Coatings*, 293 NLRB 803, 804 (1989) ("the absence of union animus nevertheless generally militates against finding a 'disguised continuance' of the predecessor").

There was no sham, scheme or disguise here. Messina attempted to save his company and his workers' jobs. He was not trying to cut corners or avoid statutory or contractual obligations. Indeed, Tri-Messine never sought to hide the fact that it was subcontracting the work to Callahan in order to perform the Con Edison work, contrary to the General Counsel's assertions in its opening statement that there was some kind of "scheme" to avoid its responsibilities. Messina was frank and open with the union and constantly advised it of what he was thinking and planning to do based on the dire circumstances. Indeed, Messina routinely discussed the Con Edison situation with Franco and Bedwell, sought their input and continually advised them what the plans were if Con Edison insisted on only using labor affiliated with the B&CTC. Indeed, Messina told Franco that he would have to subcontract the work if Con Edison insisted on B&CTC labor. Franco agreed that Messina should not have to lose his business. (393). Moreover, the union had at least as much information as Tri-Messine as it had been involved in the same process with another contractor, Nico Construction. Thus there was nothing sinister about what Tri-Messine was doing and hoping to accomplish. Far from an unlawful purpose, the decision to subcontract was made to preserve the jobs of employees who as of March 6, 2017

were indisputably prohibited from working on Con Edison projects with any union not affiliated with the B&CTC.

In *Alabama Metal Products, Inc.*, 280 NLRB 1090, 1096 (1986), the Board rejected a claim of alter ego status when a separate company was set up by the same owner to perform manufacturing of a product more efficiently.

> I find that the creation of DLI was not prompted by Alabama Metal's desire to avoid the collective-bargaining agreement. . . . DLI was not a device to drain off bargaining unit work. . . . I have concluded that DLI was not created to bleed off bargaining unit work in an effort to evade the collective bargaining agreement, I find that the application of the alter ego concept in the instant case is inappropriate.

Id. at 1096.

In *Gilroy Sheet Metal*, 280 NLRB 1075 (1986), after "Gilroy Heating & Air Conditioning," a company owned by Billie Hanomun, was closed, Gilroy Sheet Metal was formed by Billie's husband, Milton. Milton claimed that the new company was formed not "to get out of the union contract, but I did it to survive." The Board found no alter ego status:

> In adopting the judge's finding that Sheet Metal is not an alter ego of Heating & Air, we particularly note the following. As the judge found, the evidence does not establish that hostility toward the Union was a motive for terminating Heating & Air or for founding Sheet Metal Rather, the cessation of one company and formation of the other resulted from matters unrelated to the Union, including personal health, financial, and marital difficulties. *Compare, e.g., Fugazy Continental Corp*, 265 NLRB 1301 (1982), *enf'd* 725 F 2d 1416 (D.C. Cir. 1984). Additionally, the newly created company, Sheet Metal, was owned exclusively by Milton Hanoum. His wife, Billie Hanoum, who had been an owner of Heating & Air, had no ownership interest in Sheet Metal and was separated from her husband by the time he formed the latter company These circumstances distinguish the present case from others in which the Board has predicated an alter ego finding, in part, on a shift in ownership among close family members. *See, e.g., Advance Electric*, 268 NLRB 1001 (1984).

Callahan was not created to avoid any contractual or statutory obligations. Callahan was created for the legitimate purpose of satisfying a customer requirement that Tri-Messine could not perform. As Messina testified:

> Q Were you trying to avoid your obligations under the contract between Tri-Messine and Local 175?
>
> A Not at all.
>
> Q What were you trying to do?
>
> A I was just trying to stay in business and keep everybody working.

(525-526). Moreover, Messina testified that if somehow at the last minute Con Edison changed its mind, he would never had subcontracted the work to Callahan, and instead he would have kept the work with Tri-Messine. (239).

As noted, in order to perform the work for Con Edison the contractor performing the work was required to have agreements with unions affiliated with the Building Trades & Construction Trades Council of Greater New York. Indeed, if Callahan had not been created, all of the individuals formerly affiliated with Tri-Messine would have lost their employment. Instead many of these individuals immediately commenced working for Callahan under other collective bargaining agreements Callahan had with unions that are affiliated with the B&CTC.[13] Others were hired by Callahan once they became members of Local 1010. Had Callahan not been established these individuals may not have found employment.

Contrary to the allegations set forth in the complaint none of the employees were discriminated against because of their affiliation with Local 175. Tri-Messine had a long and largely peaceful relationship with Local 175. Moreover, as noted, the work being performed by

[13] This includes Teamsters Local 282 and Local 15 of the Operating Engineers.

Callahan was not Local 175's work. The Standard Terms & Conditions issued by Con Edison clearly precluded Local 175 from performing the work. In accordance with the Local 175 contract, these individuals were not qualified to perform the work and thus subcontracting the Con Edison work to Callahan was entirely lawful.[14]

C. There Was No Harm To The Employees As A Result Of The Subcontracting

In determining whether there is an alter ego relationship, courts look to whether "the ultimate consequence is that the employer would otherwise obtain an economic benefit at the expense of national labor relations policies" *D.L. Baker*, 351 NLRB 515, 550, (2007) citing *Alkire v. NLRB*, 716 F.2d 1014, 1020-1021 (4th Cir. 1983).The subcontracting did not prevent

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[14] Not only are Tri-Messine and Callahan not alter egos but even if found to be a "single employer" the employees of both companies would nonetheless have to be placed in separate bargaining units.

> The Board's cases hold that especially in the construction industry a determination that two affiliated firms constitute a single employer "does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit." *Central New Mexico Chapter, National Electrical Contractors Assn., Inc.*, 152 N.L.R.B. 1604, 1608 [***387] (1965).

South Prairie Constr. Co. v. Int'l Union of Operating Eng'rs, 425 U.S. 800, 805 (1976).

In *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76, 77 (1977) the Board set forth the factors to be considered in whether there should be separate units.

> ... The ultimate unit determination is thus resolved by weighing all the factors relevant to the community of interests of the employees. Where, as here, we are concerned with more than one operation of a single employer, the following factors are particularly relevant; the bargaining history; the functional differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees.

(emphasis added). *See A--1 Fire Protection, Inc.*, 250 NLRB 217, 220 (1980) (Board and courts have acknowledged that in the construction industry a single employer may have different companies perform work under different conditions).

Under these factors, there is no basis for finding a single unit appropriate. First, Tri-Messine has no employees. Second, even if it did, it is undisputed that the Con Edison work makes up over 95% of the work and can only be performed by Local 1010 workers of Callahan. Placing Callahan employees in the same unit with individuals who cannot perform the same kind of work and are in fact barred from performing the work would hardly involve employees with the same community of interest.

anyone from receiving something they might not otherwise have received. To the contrary, it is indisputable that the subcontracting of the work benefited the employees as many of them received work immediately. Eventually almost all of the former Tri-Messine workers who wished to work for Callahan were hired by and continue to work for Callahan receiving a steady paycheck and benefits. If the Con Edison work had not been subcontracted all of those jobs would have been lost.

As in *Massachusetts Carpenters*, *supra*, the subcontracting of this work did not make the union membership "worse off." To the contrary the workers retained or eventually obtained jobs they would not have received but for the subcontracting. This is precisely the kind of situation discussed by the Court in *Massachusetts Carpenters*.

In sum, in considering all of the equitable considerations, *Joe Costa Trucking*, *supra*, there can be no finding other than that Tri-Messine and Callahan are not alter egos.

POINT III

TRI-MESSINE HAD NO LEGAL OBLIGATION TO BARGAIN OVER THE DECISION TO SUBCONTRACT CON EDISON WORK[15]

In *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that an employer was required to bargain over its decision to subcontract bargaining unit work to an outside contractor. The Court underscored that a key consideration in this area is whether the employer's conduct "is suitable for resolution within the collective bargaining framework[.]" *Id.* at 214.

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning . . . the basic scope of the enterprise are not

[15] As noted in Point I, *supra*, the contract was limited to "qualified" employees. As such, because the Local 175 members were not qualified as of March 6, 2017, the subcontracting to Callahan was entirely lawful and consistent with the agreement, *i.e.*, there was no need to bargain for this additional reason.

> in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise . . . should be excluded from that area.

Id. at 223. "When labor costs underlie the employer's decision to subcontract bargaining unit work, the decision is particularly amenable to the collective-bargaining process." *Finch, Pruyn & Co., Inc.*, 349 NLRB 270, 274 (2007).

In *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court held that an employer which provided cleaning and maintenance services to commercial establishments was not required to bargain with a union over the employer's decision to discontinue operations at a nursing home, even if such decision resulted in the discharge of its employees working there after the employer was unable to secure an increase in its management fee. The Court reasoned that the employer's decision to shut down part of its business constituted a significant "change in the scope and direction of the enterprise [which] is akin to the decision whether to be in business at all[.]" *Id.* at 677.

> The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole.. . . This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . Nonetheless, in view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective

> bargaining process, outweighs the burden placed on the conduct of the business.

Id. at 678-679 (emphasis added).

In *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1370 (1982), the Board noted:

> Thus, it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control," the decision will not fall within the scope of the employer's mandatory bargaining obligation. A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives.

Id. at 1370 (internal citations omitted, emphasis added). *See also Minteq Int'l, Inc.*, 364 NLRB No. 63 at *14 (2016) ("[u]nder the principles in *Dubuque Packing Company, Inc.*, 303 NLRB 386 (1991), the issue of a bargaining obligation focuses on whether the employer's decision is amenable to bargaining"). *Accord, Mike-Sell's Potato Chip Co.*, 2017 NLRB LEXIS 374, *39-*41 (July 25, 2017).

In *Dorsey Trailers v. NLRB*, 134 F.3d 125 (3d Cir. 2000), the employer subcontracted work to another company for a number of reasons, including inability to find qualified personnel, a backlog of orders, and rapid loss of sales. Based on these factors the Court held that subcontracting was not considered to be a "term and condition of employment" under the Supreme Court's decision in *First Nat'l Maint. Corp., supra.*

> The development of the case law alluded to above leads this Court to conclude that the Dorsey/Bankhead subcontract does not fall within the realm of "other terms and conditions of employment." We are mindful that certain subcontracting agreements must be submitted to union bargaining; however, we believe that the type of employment relationship involved here does not warrant union bargaining.
>
> The Board is correct in its finding that the work performed at Bankhead is the same type of work performed at the Northumberland plant. In both instances the relevant work is the building of trucks. But, in light of management's underlying reasons for subcontracting, *i.e.*, to avoid lost sales, this, without more, does not justify mandatory bargaining. Our review of the records and transcripts below convinces us that Dorsey's reasons for entering into a subcontracting agreement with Bankhead properly centered around the scope and direction of Dorsey's future viability.

Dorsey Trailers v. NLRB, 134 F.3d at 131-32.

In *Oklahoma Fixture Co.*, 314 NLRB 958, 960 (1995), the employer elected to subcontract its electrical work because it was concerned about legal liability that might cause it to lose Dillard's Department Store — its largest customer who accounted for more than 95 percent of its revenue. The Board found that this was a core entrepreneurial decision that need not be bargained.

> As discussed above, the judge credited Cavins' testimony that he decided to subcontract the electrical work because he was concerned about legal liability and the risk of losing virtually all the Respondent's revenue in the event of electrical damage to Dillard's property or customers resulting from an improperly wired fixture. Cavins explained that the subcontractor would serve as a buffer insulating the Respondent from these risks. ''Labor costs,'' even in the broad sense of the term employed by the Board, were not a factor in the decision. Accepting as we do the credited reasons for the Respondent's decision, we find that it involved considerations of corporate strategy fundamental to preservation of the enterprise. We further find that the Union had no authority or even potential control over the basis for the decision. Therefore, we conclude that the subcontracting decision was outside the scope

> of mandatory bargaining and that the Respondent's failure to bargain over it did not violate Section 8(a)(5) and (1) of the Act.[16]

The decision to subcontract the work to Callahan like that in *Oklahoma Fixture Co.* was a core entrepreneurial decision that was not amenable to the collective bargaining process. Con Edison had issued its Standard Terms & Conditions mandating only the use of labor affiliated with the B&CTC. There was nothing Tri-Messine or the union could do to change that during bargaining. Moreover, Al Messina had made numerous attempts to try and change Con Edison's mind. This included:

- offering Con Edison an extension of the contract for one year at no additional cost (516-517, 199-200).
- offering Con Edison an extension of the contract for one year at a 5% discount (*Id.*)
- attempting to convince Con Edison that Tri-Messine was not covered by the Standard Terms & Conditions because B&CTC labor as not "available" (200, 519).

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[16] In *Lenz & Riecker*, 340 NLRB 143 (2003), Chairman Batista, in a concurring opinion, noted that "[d]ecisions to subcontract are not always mandatory subjects of bargaining." *Id.* at 146. He went on to note:

> The Respondent's decision here to subcontract was just such a core entrepreneurial decision and, therefore, was not a mandatory subject of bargaining. The record shows that the Respondent subcontracted with Interstate Litho Corporation (Interstate) to complete its pending orders as part of its decision to give up its efforts to sell the Company as a going concern, and instead to liquidate the Company. The Respondent intended to shut down, but it feared that if it did so immediately, it would not be able to complete customer work in progress. The result would be that the customers would not pay and might sue. As a stop-gap measure, the Respondent resorted to subcontracting for a period of about 1 month. Thus, the subcontracting was an entrepreneurial decision to delay the shutdown so as to avoid the economic consequences of an immediate shutdown.
>
> This case is not a typical *Fibreboard* subcontracting case where, for labor cost reasons, the employer substitutes the subcontractor's employees for its own without altering its ongoing operations. For example, in *Torrington Industries*, 307 NLRB 809 (1992), the employer's normal business—the production and sale of ready-mix concrete—continued unaltered by the employer's decision to subcontract truck driving services used to transport the concrete. In the instant case, the decision to subcontract the pending work was part of the Respondent's decision to radically change its overall operations—indeed to end them. To compel the Respondent to bargain over its decision to subcontract here would be to require the Respondent to cede control over the scope and direction of its business. The Act does not require such a relinquishment of control.

Id. at 146-147.

Indeed, not only did Tri-Messine seek to change Con Edison's decision, Local 175 tried as well. Anthony Franco testified that he and Roland Bedwell met with Michael Perrino, Section Manager for Con Edison, in 2014, but were told that this decision had been made from the "higher ups" and would not be changed. (386).

All of these options were rejected by Con Edison who demanded that Tri-Messine enter into contracts only with unions affiliated with the B&CTC or lose the work entirely to another contractor. There was nothing the union could offer Tri-Messine, *i.e.*, this did not turn upon labor costs or any economic issues that could be dealt with through the bargaining process. Indeed, the Union admitted that there was nothing either it or Tri-Messine could do to change the situation. (390-391). As such, there was no obligation for Tri-Messine to bargain with the union over the decision to subcontract work to Callahan.[17]

Finally, because the subcontracting of the work to Callahan was not a mandatory subject of bargaining, there can be no § 8(d) violation. As the Board noted in *Brown Co.*, 278 NLRB 783, 784 (2006), "only a unilateral midterm modification of a mandatory subject of collective bargaining violates the Act" (emphasis in original) *citing Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Glass Co.*, 404 U.S. 157 (1971). *See also Solutia, Inc.*, 357 NLRB 58, 63, (2011) ("Section 8(d) only applies to mandatory subjects of bargaining"); *FirstEnergy Generation Corp.*, 358 NLRB 842, 848 (2012) ("[t]he statutory duty to bargain, and the prohibition on unilateral changes, extends only to mandatory and not permissive subjects of bargaining. The distinction emanates from Section 8(d) of the Act, 29 U.S.C. § 158(d), which

[17] As noted, *supra*, pp. 12, 51 Callahan tried to convince Local 1010 to allow all of the existing Tri-Messine workers to move directly to Callahan by offering to pay higher wages than proposed by Local 1010. This was rejected by 1010 who insisted that its hiring hall be used as the exclusive method for hiring workers.

defines the scope of the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment").[18]

POINT IV

EVEN IF TRI-MESSINE WERE UNDER A DUTY TO BARGAIN WITH THE UNION OVER THE DECISION TO SUBCONTRACT AND/OR ITS IMPACT/EFFECT, IT SATISFIED ITS OBLIGATIONS AND/OR THE UNION WAIVED ITS RIGHT TO BARGAIN.

As set forth *supra*, Point III, Tri-Messine had no obligation to negotiate with the union over its subcontracting of Con Edison work because the decision to subcontract was a non-mandatory decision not amenable to the bargaining process. Notwithstanding the fact that it had no obligation to bargain, the overwhelming evidence, including the testimony of Al Messina and Union official Anthony Franco demonstrates that (a) Tri-Messine did negotiate and meet with the union and/or (b) the union deliberately failed to timely request negotiations with Tri-Messine representatives and/or (c) even when an untimely request for effects bargaining was made and agreed to by Tri-Messine, the union failed to follow-up.

A. Messina Routinely Met With Local 175 Representatives

Messina testified that after initially finding out about Con Edison's implementation of the new Standard Terms & Conditions in 2014, he *immediately* called the union to alert it about this issue. From the time he first find out about the "clarification" in late 2014 until the layoffs in March 2017, Messina routinely met with Roland Bedwell and Anthony Franco and discussed the

[18] The General Counsel may cite the Board's decision in *Torrington Enters.*, 307 NLRB 809 (1992), in support of its position. In *Torrington*, however, the Board found that since the employer's decision to subcontract and transfer the work of two employees to a nonunit employee had nothing to do with a change in the scope and direction of its business or any entrepreneurial reasons, but merely changed the identity of the employees doing the work, it was required to provide the union with notice and an opportunity to bargain before making such decisions. In reaching its decision the Board noted that "there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining." *Id* at 810. *See also Overnight Transp. Co.*, 330 NLRB 1275 (2000) (subcontracting, motivated by nonlabor cost considerations, may not be a mandatory subject of bargaining in cases in which the decision relates to a change in the scope and direction of the employer's business). In any case, the subsequent decision in *Oklahoma Fixture Co., supra,* not only distinguished *Torrington* but is far more apposite to the facts at hand.

situation. While the decision was being made by Con Edison, they nevertheless discussed the matter constantly. Messina met with Bedwell weekly and at least every other week with Franco. (514-515). In early January 2017 after having exhausted every avenue, he advised Bedwell and Franco at a meeting at a diner in Syosset that he would have no choice but to subcontract the work to another company and allow 1010 workers perform the work. (528). No demand to bargain was made by the union. Messina then met with the entire workforce in early or mid-January to advise them (and again the union) that he had no choice but to layoff the men or move them into another union, *i.e.*, Teamsters or Operating Engineers. (530). Again, there was no demand to bargain. A meeting was also scheduled at Tri-Messine's attorneys' offices on January 13, 2017 but the union did not show. (GC Exhibits 12, 22). Thereafter, Callahan signed the agreement with Local 1010 on January 13, 2017 (effective February 1, 2017) but no subcontracting had yet to take place and did not take place until March 6, 2017. Nothing prevented the Union from asking to meet with Tri-Messine to discuss the matter further at that time. Indeed, Messina testified that if something changed in the interim he simply would not have subcontracted the work to Callahan and Tri-Messine would have continued to perform the work. (239-240). The Union simply made no demand. Moreover, Messina met again with Franco (alone) at the diner on January 18, 2017 (GC Exhibit 12; 527) and advised him as to what was occurring. Thus, in January 2017, Messina had told everyone about the plan to subcontract the work. He continued to meet with the union in January and February 2017 and sent the union a letter advising them of his intentions (GC Exhibit 17-a). There was no response to the letter.

Anthony Franco confirmed Messina's testimony. He admitted that he routinely met with Messina at a nearby McDonalds to discuss the Con Edison situation. Messina never refused to

meet with him. (370, 380, 411-412). Moreover, when the Con Edison situation become an issue they spoke even more frequently. (379)

In response to questioning from the General Counsel, Franco testified that:

> Q Okay. Well, let's focus on May of 2016. How -- and what form did your conversations take place?
>
> A We would speak to each other, discuss the goings on of what was happening with Con Edison and the new standard terms and conditions, the work that was related to that, what was going on, any issue with the contractors, if -- if other contractors were affected and various different topics.
>
> Q And what, if anything, did Mr. Messina say to you during these conversations in May regarding the Con Edison work?
>
> A There were discussions in May and prior to that about Con Edison wanting Tri-Messine and other contractors to sign contracts with Local 1010.

(365). When Messina met with Franco in January 2017, Franco testified that Messina advised him that he had no choice but to subcontract the work:

> He said he's got bad news. He had to sign a contract with Local 1010 unfortunately and that he was going to do whatever he could to try to keep the guys as busy as he could, including putting [them] into other unions, you know, so that they would be able to continue to work on the Con Edison work. And he also was going to try to 1010 to see if he can get his -- some of his guys to be able to become 1010 members so that they could -- he could keep his same workforce, but it was my understanding that there was some meetings with 1010, and 1010 wouldn't allow that, but he was going to try again to try to keep the men, you know, with the company and keep everybody, you know, intact, but he was denied that by 1010.

(371).

Later, also in January 2017, when Messina made the announcement to all of the men (and union) in the Flushing truck yard that he would be subcontracting the work, there was no objection. (394). Bedwell explained to the workers that this was not something Messina wanted

to do. (373-374). Of course, the fact that there would be layoffs was not unexpected by the union. Indeed in its filing with the New York State Public Service Commission (Resp. Exhibit 1), as well as in the federal court anti-trust action (Resp. Exhibit 2), Local 175 repeatedly stated that the implementation of the Standard Terms & Conditions would mean layoffs of its members by contracts, such as the one with Tri-Messine. Thus, the suggestion that Local 175 did not understand that layoffs would be forthcoming is simply untenable.[19]

B. The Union Never Made a Timely Request to Bargain

Not only is it clear that Messina met with the union regularly and advised them of everything that was taking place, but the union admittedly never made any demand to bargain over the layoffs of its members. This is fatal to any claim under § 8(a)(5).

"The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter." *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982). *See also Haddon Craftsman*, 300 NLRB 789, 799 (1990).

> . . . [T]he duty to bargain arises on a request to bargain from the union. *Kansas Education Assn., supra*, 275 NLRB at 639; *Medicenter Mid-South Hospital, supra*, 221 NLRB at 678-679. Waiver may occur even where a union has received no formal, written notice of the proposed change if the union in fact received sufficient notice of the proposal to give it the opportunity to make a meaningful response. *American Buslines*, 164 NLRB 1055, 1055-1056 (1967) (union must act diligently to enforce representational rights). Waiver may also occur when a union takes no action after receiving notice, *see Reynolds Metal Co.*, 310 NLRB 995, fn. 3, 1000-1001 (1993) (union's initial request to bargain was pursued and then abandoned); *The Goodyear Tire & Rubber Co.*, 312 NLRB 674, fn.1 (1993) (union must follow up

[19] The General Counsel did not call Bedwell as a witness to refute any of Messina's assertions about their conversations and meetings. The ALJ should therefore invoke the "missing witness" which "allows a judge to draw an adverse inference against a party that fails to call a witness who is under the control of that party and is reasonably expected to be favorably disposed towards it." *See Heart & Weight Inst.*, 366 NLRB No. 53 at p. 1 (2018).

> where there is discussion but no agreement; silence indicates a lack of due diligence) or makes an untimely request to bargain after receiving notice. *Kansas Education Assn., supra*, 275 NLRB at 639 (request to bargain untimely where one month advance notice given and request to bargain made one month after implementation).

Vigor Indus., LLC, 363 NLRB 1, 8 (2015).

In *Citizens Nat'l Bank of Willmar*, 245 NLRB 389, 389-390 (1979), the Board noted:

> It is well established that it is incumbent upon a union which has notice of an employer's proposed change in terms and conditions of employment to timely request bargaining in order to preserve its right to bargain on that subject. The union cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter.

(footnotes omitted).

> When an employer notifies a union of proposed changes in terms and conditions of employment, or where the union receives actual notice of those proposed changes, it is incumbent upon the union to act with due diligence in requesting bargaining. *RBE Electronics of S.D., Inc., supra*, 320 NLRB 80. Where the union does not act with diligence in requesting to bargain, it will have waived its rights. *Haddon Craftsmen, Id.; Jim Walter Resources*, 289 NLRB 1441 (1988) *Clarkwood Corp.*, 233 NLRB 1172 (1977). Filing an unfair labor practice charge rather than requesting to bargain over impending changes will constitute a union waiver. *Newell Porcelain Co., Inc.*, 307 NLRB 877 (1992); *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979).

Union-Tribune Publishing Co., 2001 NLRB LEXIS 569, at *41-42 (July 26, 2001). *See also Lapeer Foundry and Machine, Inc.*, 289 NLRB 952, 954 (1988) ("should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation") *citing Paramount Liquor Co.*, 270 NLRB 339, 343 (1984) *and Smyth Mfg. Co.*, 247 NLRB 1139, 1168 (1980); *U.S. Lingerie Corp.*, 170 NLRB 750, 752 (1968) ("the Union had sufficient notice of Respondent's intended move to place upon it the burden of demanding bargaining if it wished to

preserve its rights to bargain about the decision to move and the effect of such decision upon the employees' terms and conditions of employment").

At the hearing Franco admitted that he never requested Tri-Messine to bargain:

> Q Did you ask Mr. Messina at this meeting to bargain over the termination [or] layoffs?
>
> A No. No, I did not

(371). Similarly, Messina never refused to meet with the Union. (515).

The General Counsel apparently maintains that the union was never under any obligation to bargain because the proposed changes were presented as a *fait accompli*. *See, e.g., Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004) and 343 NLRB 84 (2004). But in that case the employer provided last minute changes to the union. Here, Messina was discussing and meeting with the union for months, if not years, since the 2014 Standard Terms & Conditions were issued. He did not present it as a *fait accompli* as he even tried to convince Con Edison to allow him to use Local 175 labor or extend his contract. If anyone, it was the union who considered Con Edison's conduct to be a "*fait accompli*." Franco testified as follows:

> Q Did you say . . . in your affidavit, "I did not ask Mr. Messina to bargain over the last because it was a done deal. The decision had already been made by Con Ed;" did you say that?
> A If that's what the affidavit says, yeah, that's what I said.

(393, emphasis added). Thus, it was *the Union* that considered the situation to be a *fait accompli* because *Con Edison* made the decision.[20] Indeed, Messina in response to a question from Judge Gardner testified that if something changed at the last minute, *i.e.,* Con Edison changed its mind, he would not subcontract the work. (239-240). For more than two months in 2017 Tri-Messine continued to perform the work but there was no demand by the union to bargain.

[20] As noted, in the months and years prior to the subcontracting of work in March 2017, Local 175 had claimed that Con Edison's clarification of the Standard Terms & Conditions would result in layoffs and loss of jobs for its members. (*See* Resp. Exhibits 1 and 2).

C. Tri-Messine's Offers to Meet Were Ignored

The refusal to bargain charge is all the more frivolous given the fact that Tri-Messine, upon request of counsel for Local 175, agreed to meet with its and Local 175's representatives only for Local 175 to fail to even attend the meeting. In January of 2017 counsel for Local 175 contacted counsel for Tri-Messine and asked to have a meeting to discuss the issues relating to the Standard Terms & Conditions and their effect on Local 175 members. On January 10, 2017, immediately following a telephone discussion between counsel for Tri-Messine and counsel for Local 175, Local 175's counsel sent an e-mail as follows:

> Mark: Thanks for speaking to me regarding Tri-Messine and the issues Local 175 is confronted with in regards to Consolidated Edison insisting on Tri-Messine having a collective agreement with Local 1010, LIUNA. . . .

(*See* GC Exhibit 22). Counsel for Tri-Messine responded approximately one hour later:

> Let's meet to discuss issues related to the 175 contract. Can you come to my office in Garden City with your client on Friday [January 13] around 2:30 p.m.? I will have Al Messine [sic] here.

(*Id.*). The meeting was agreed to but the union did not show up as scheduled. Thereafter Messina spoke with the union who advised that a meeting with counsel was no longer necessary.

> I just spoke with Roland who contacted Anthony Franco and was told there is no need to have a meeting with the attorneys. I will meet with Anthony alone on Wednesday. I will call you after the meeting . . .

(*See* GC Exhibit 10). While Messina testified that he did in fact meet with Franco the following week, the fact remains that Tri-Messine and its counsel immediately responded to the union request to meet and discuss the issues facing them. The union, however, not only failed to show up to the meeting, but then insisted that any meetings take place without counsel present.[21]

[21] This, of course, was improper as § 8(b)(1)(B) makes it an unfair labor practice for a union to restrain or coerce an employer in the selection of its representatives for purposes of collective bargaining. *See Int'l Bhd of Elec. Workers*,

In February 2017 Tri-Messine sent a letter to the union advising of its intent to subcontract and its reasons and also wrote that "if you would like to discuss this, please feel free to contact me." (GC Exhibit 17-a). There was no response from the union.

On March 27, 2017 counsel for Local 175 sent an e-mail to Tri-Messine's counsel asking if they could speak "regarding a variety of issues stemming from allegations of alter ego and joint employer." Counsel for Tri-Messine expressed a willingness to speak, but there was no follow up from Local 175. (Resp. Exhibit 4).

Further on May 12, 2017 counsel for Local 175 sent an e-mail to counsel for Tri-Messine requesting that the parties meet to bargain a new contract. (*See* GC Exhibit 24-c). Counsel for Tri-Messine responded noting that Tri-Messine had terminated the contract and attached letters evidencing the termination. (*See* GC Exhibits 24-c and 24-b). Nonetheless counsel for Tri-Messine specifically agreed to meet to "discuss any concerns you might have under the current agreement." (GC Exhibit 24-c) (emphasis added). Counsel for Local 175 acknowledged that a letter terminating the contract had been received but insisted that Tri-Messine still needed to negotiate a new collective bargaining agreement with Local 175. (*See* GC Exhibit 24-a). Then, *for the first time*, on May 18, 2017, counsel for Local 175 raised the issue of bargaining over the effects of the subcontracting. (*Id.*). Thereafter on May 22, 2017 counsel discussed the situation. On May 23, 2017 counsel for Tri-Messine sent an e-mail stating its position that Tri-Messine had elected to terminate the agreement effective June 30, 2017 but was still willing to meet to discuss the impact of decisions on Local 175 members, despite the passage of several months. Counsel

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296 NLRB 1095, 1101 (1989) ("when a union engages [refuses to meet or otherwise recognize the] . . . employer representatives, it violates Section 8(b)(1)(B) because of the restraint on the employer's selection of its representatives, and it violates Section 8(b)(3) because such conduct does not meet the requirements for good-faith bargaining. An underlying theory of the 8(a)(5) and 8(b)(3) violations in many cases is that insistence on the other party's being represented by someone other than its chosen representatives amounts to an insistence on a no mandatory, *i.e.*, permissive, subject of bargaining.").

for Tri-Messine noted that it would wait to hear from counsel as to how Local 175 planned to proceed. Local 175 failed to respond any further. (*See* GC Exhibit 24-a).

> BY MR. REINHARZ: I did indicate in my email to you on May 24, 20 -- that Tri-Messine was willing to discuss the impact of certain decisions, such as the layoffs. Isn't that right?
>
> A Your email advised a willingness to meet to discuss impact of certain decisions on 175 members.
>
> Q And did you follow up with me in response to this email?
>
> A I don't believe I did.
>
> * * * *
>
> Q I never told you that I would never talk to you about the issues facing Tri-Messine; is that fair to say?
>
> A That's fair to say.
>
> Q Okay, I was willing -- I talked to you on the phone whenever you called, or sent me an email, I responded to you; isn't that right?
>
> A That's correct.
>
> Q I never said I'm not willing to negotiate; isn't that right?
>
> A That's correct.

(339, 341).

In *Taylor-Winfield Corp.*, 1995 NLRB LEXIS 502, at *10-11 (May 30, 1995), it was held that when a union had waited months to request bargaining over the effects of a decision to close a plant, it had waived its rights to engage in "effects" bargaining:

> In this case, the Union did not request "effects" bargaining until well over 4 months following notification of the tentative plant closing decision, which was, itself, accompanied by an invitation to engage in bargaining about the decision and its effects. Indeed, the Union's December 15, 1993, request to bargain about "effects," came fully 2 months after it was notified that the decision to close

> had been finalized and effectuated. When the parties, finally, did meet, on December 23, the Union made no concrete proposals, even at that very late date, but simply listed topics for discussion. The record evidence provides no explanation for the failure of the bargaining representative to take advantage of the opportunity to bargain.
>
> I conclude that, under the governing case law, the Union, by its months of unexplained inaction, waived its right to engage in "effects" bargaining concerning closure of the Warren, plant. Accordingly, the refusal to bargain allegations must be dismissed.

See also Sierra Int'l Trucks Inc., 319 NLRB 948, 950 (1995) ("the Board, in determining whether a union has waived its right to bargain regarding effects of a sale or closure on bargaining unit employees, has looked to whether the union requested such bargaining within a reasonably brief period of time following notice of the sale or closure"); *Ogden Entm't Servs., Inc.*, 1995 NLRB LEXIS 806, at *19 (Aug. 24, 1995) *quoting Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954 (1988) ("[o]nce an employer has notified a union, it is essential that 'negotiations concerning this decision occur in a timely and speedy fashion. Thus, should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the decision, we find that the company has satisfied its bargaining obligation.'").

In light of the fact that Tri-Messine notified the union as early as the beginning of January 2017 that it was seeking to subcontract the work to Callahan and use 1010 labor (and of course the union knew months, if not years, before that the Standard Terms & Conditions would negatively impact its members (Resp. Exhibits 1 and 2)), any request for impact bargaining in May 2017 was much too late. It is all the more untimely given the fact that the union admitted that when advised of the situation in January it did not ask to bargain over these issues. Further, even though the effects bargaining request was untimely, Tri-Messine expressed willingness *in writing* to meet over this issue, but the union never followed up to schedule a meeting. As such,

any claim that Tri-Messine failed to bargain over the effects of the decision to subcontract is completely without merit.

In short, there simply was no failure to bargain with Local 175 over the decision to subcontract and/or layoff workers and/or effects.

POINT V

TRI-MESSINE WAS UNDER NO OBLIGATION TO NEGOTIATE A SUCCESSOR COLLECTIVE BARGAINING AGREEMENT WITH LOCAL 175

As set forth below, under the Local 175 contract Tri-Messine had the option to terminate the agreement effective June 30, 2017. Tri-Messine exercised this option. Thus as of July 1, 2017 neither Tri-Messine nor Callahan was required to negotiate with Local 175, nor were they required to use any Local 175 labor as of July 1, 2017. Any contractual or statutory claims after that date (and any corresponding liability) would therefore be without foundation.

A. Tri-Messine Properly Terminated The Contract Effective June 30, 2017

It is undisputed that on February 28, 2017 Tri-Messine issued a written notification that it had withdrawn from NYICA. The union was provided a copy of the notice. (*See* GC Exhibits 17-b and 17-c). Also, on March 13, 2017 Tri-Messine sent a letter via overnight mail and certified mail advising Local 175 that it was terminating the contract effective June 30, 2017 pursuant to the terms of the collective bargaining agreement. (GC Exhibit 24-b).

Article IV of the parties' 2014-2017 contract provided as follows:

Term-Renewal

> This Agreement shall continue in effect until and including June 30, 2017, and during each year thereafter unless on or before the fifteenth (15th) day of March 2017, or on or before the fifteenth (15th) day of March of any year thereafter, written notice of termination or proposed changes shall have been served by either party on the other party.

> In the event that written notice shall have been served, an agreement supplemental hereto, embodying such changes agreed upon, shall be drawn up and signed by June 30th of the year in which the notice shall have been served.

(GC Exhibit 6, p. 9, emphasis added).[22]

It is well settled that "[r]ights and duties under a collective bargaining agreement do not otherwise survive the contract's termination at an agreed expiration date." *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26-27 (2d Cir. 1988). As the Court noted in *"Automatic" Sprinkler Corp. of Am. v. NLRB*, 120 F.3d 612 (6th Cir. 1997):

> ...when the collective bargaining agreements between Petitioners and the unions with section 9(a) bargaining status terminated, rather than merely expired, upon their respective expiration dates, and because the agreements did not provide otherwise, Petitioners were relinquished of any contractual or statutory obligations to the unions. They cannot now be forced to negotiate new agreements with the unions or be prohibited from engaging in nonunion subcontracting. As the Supreme Court has stated, "The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract or hiring individuals on whatever terms' the employer 'may by unilateral action determine.'" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 81 L. Ed. 893, 57 S. Ct. 615 (1937).

Id. at 619.

Similarly, in *New York News, Inc. v. Newspaper Guild of New York*, 927 F.2d 82 (2d Cir. 1991), the parties entered into a collective bargaining agreement that allowed either party to

[22] It is, of course, significant that the contract provided the parties three separate options at the end of the agreement. A party could (a) do nothing and allow the contract to renew for one year; (b) serve written notice of termination of the agreement; or (c) serve written notice of proposed changes. Here, Tri-Messine chose option (b) – to terminate the agreement. The union's claim that "written notice of termination" meant "propose termination" (303) has absolutely no support in the text of the provision. The contract speaks of "proposed changes" only. Moreover, if the union's interpretation were correct, *i.e.*, that written notice of termination meant that the parties would still have to negotiate, it would mean that they have to bargain a new agreement by submitting proposed changes to one another. This would render option "c" superfluous. "[T]the law abhors an interpretation that results in the language of a contract having no meaning at all." *NTN Bower Corp.*, 2010 NLRB LEXIS 119, at *292 (2010) *quoting In re Hill, NTN Bower Corp.*, 981 F. 2d 1474, 1487 (5th Cir. 1993). Moreover, the Respondents interpretation is consistent with Board and appellate authority, *infra.*

terminate the agreement upon its expiration. The employer terminated the agreement and the Court held that its actions were entirely lawful:

> Citing Article 25(a)'s nonmandatory language ..., the district court rejected the Guild's position that the News had a contractual obligation to negotiate in good faith for a successor collective bargaining agreement before exercising its right to terminate the Agreement. Instead, the court correctly found that each of the parties had an unqualified right to terminate the Agreement after its expiration by providing written notice. We believe that Article 25(a) is not susceptible of competing interpretations. *See AT & T Technologies*, 475 U.S. at 650; *Warrior & Gulf*, 363 U.S. at 582-83. Therefore, because it is undisputed that the News sent the Guild written notice of termination after expiration of the Agreement, the Agreement was terminated pursuant to its terms, and the district court did not err in granting the News a declaration to this effect.

Id. at 84-85. *Accord, Int'l Bhd. of Elec. Workers, Local 26 v. Advin Elec., Inc.*, 98 F.3d 161, 164-65 (4th Cir. 1996) (finding letters sent by employer to union indicating its desire to terminate the collective bargaining agreement upon its expiration effectively terminated agreement).

These cases are in accord with Board precedent that a bargaining representative may contractually relinquish a statutory right if the relinquishment is expressed in clear and unmistakable terms. *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962).

For example, in *Cauthorne Trucking*, 256 NLRB 721 (1981), *enforcement granted in part, denied in part*, 691 F.2d 1023 (D.C. Cir. 1982), the parties' pension agreement provided:

> IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate, unless, in a new collective bargaining agreement, such obligation shall be continued.

Id. at 722. The Board held that this provision constituted a waiver. The Board concluded that this language, explicitly stating that all company obligations under the pension agreement shall

"terminate" upon expiration of the contract, expressed a clear intent to relieve the employer of any obligation to make payments after contract expiration.

In *Senator Theater*, 277 NLRB 1642, 1643 (1984), *enforcement denied, NLRB v. Gateway Theatre Corp.*, 818 F.2d 97 (D.C. Cir. 1987),[23] the Board held:

> We find that with respect to the intended duration of the relationship the parties agreed at their 16 June 1983 meeting that the Respondent would be free to 'walk away' after the expiration of approximately 6 months. Accordingly, we conclude that when the Respondent terminated its relationship with the Union on 20 March 1984, it was exercising a right created by its agreement with the Union and did not thereby violate Section 8(a)(5) and (1) of the Act. Having lawfully terminated its relationship with the Union, the Respondent was free to alter terms and conditions of employment without bargaining.

Here, the collective bargaining agreement between Tri-Messine and Local 175 did not merely expire, it was "terminated." As noted, the parties negotiated a provision under which either party had the absolute right to terminate the agreement provided it was done so by March 15, 2017. This condition was fulfilled by Tri-Messine and the union admittedly understood that Tri-Messine had terminated the contract of June 30, 2017. (299) (*see also* GC Exhibit 24-b). Accordingly, effective July 1, 2017 Tri-Messine had no contractual or statutory obligations towards Local 175.

B. Tri-Messine Had No Employees and Therefore Was Under No Obligation to Negotiate a New Contract With Local 175

Not only was the contract properly terminated leaving Tri-Messine under no obligation to negotiate with Local 175 as of June 30, 2017, but as of March 6, 2017 Tri-Messine no longer had any bargaining unit employees. (72) (*see also* GC Exhibit 16). The Board has held "that where a unit consists of no more than a single permanent employee at all material times, the employer

[23] The court denied enforcement of the Board's decision only on the unrelated issue that the discharge of the workers had violated § 8(a)(3).

has no duty to bargain, and further, will not be found in violation of the Act for disavowing a bargaining agreement and refusing to bargain with the bargaining representative of a one-man unit." *Wilson & Sons Heating & Plumbing, Inc.,* 302 NLRB 802 (1992). Absent any employees Tri-Messine had no obligation to bargain a successor contract with Local 175.

Moreover, while Local 175 maintains that Callahan is an alter ego of Tri-Messine the fact remains that as of March 2017 Local 1010 represented a majority of Callahan employees. Negotiating a collective bargaining agreement with Local 175 at this time would have been unlawful. Further, at the time of the demand to bargain was made (and thereafter) Local 175 was unable to provide labor capable of performing Con Edison work. Thus it is unclear what need there would be for a contract when there was no work to perform and all of the employees were represented by Local 1010.

POINT VI

THE BOARD LACKS JURISDICTION OVER MANY OF THE CLAIMS ASSERTED IN THE COMPLAINT

As set forth above, the first charge (29-CA-194470) herein was filed on March 7, 2017 alleging violations under § 8(a)(1), (2), (3) and (5) of the Act. However, on April 28, 2017 the Board approved withdrawal of the alleged unlawful termination of employees in violation § 8(a)(1) and (3). (Appendix A). While a second charge in Case No. 29-CA-206246 was filed on September 14, 2017 asserting violations of § 8(a)(3) for the termination of Local 175 employees, the charge clearly sought to relitigate what already had been withdrawn as of April 28, 2017. Moreover Tri-Messine subcontracted the work to Callahan on March 6, 2017 – and those employees were laid off more than six months prior to the filing of the new charge. Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." The fact that the

earlier charge was withdrawn is of no moment as the Board "treat[s] withdrawn and dismissed charges alike and [does] not allow the reinstatement of either beyond the 6-month limitations proviso absent fraudulent concealment by the respondent." *Northwest Towboat Ass'n*, 275 NLRB 143, 144 (1985), *citing Ducane Heating Corp.*, 273 NLRB 1389, 1391 (1985). Thus, any claim of any unlawful termination of employees was either dismissed or is untimely.

Moreover, the amended charge in Case No 29-CA-194470 is both procedurally and substantively defective. It belatedly claims for the first time that Respondents unlawfully recognized 1010 as a labor organization. Here it is undisputed that Callahan signed an agreement with Local 1010 on January 13, 2017 and that on March 6, 2017 Callahan began performing work for Tri-Messine using labor from Local 1010 because of its affiliation with the Building & Construction Trades Council. Because September 14, 2017 is more than six months after either January 13, 2017 or March 6, 2017 any claim that Tri-Messine unlawfully recognized Local 1010 would be time barred.[24]

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[24] In fact, Local 175 knew for years that its workforce could not perform the work for Con Edison as it was advised by both Con Edison and Tri-Messine of this fact. *See* pp., 10-11, 18-20, 52, 55-56 *supra*, for discussions of the meeting and conversations Messina had with union officials about this issue as well as Local 175's filings with the New York State Public Service Commission and the Southern District of New York. (Resp. Exhibits 1 and 2).

In addition, while the General Counsel may claim that the amended allegations relate back to the earlier charge filed on March 7, 2017, no such assertion should be entertained.

> The Board considers (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge; (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations.

WGE Federal Credit Union, 346 NLRB 982, 983 (2006) (emphasis added). *See Carney Hosp.*, 350 NLRB 627, 630-631 (2007) (fact that events occurred during the same organizational campaign and the same general time period was found to be insufficient to support a finding of factual relatedness); *Oradell Health Care Ctr.*, 2013 NLRB LEXIS 630, at *31 (NLRB Sept. 20, 2013) ("it is questionable whether the untimely allegations, which were first raised in an untimely amended charge in March 2013, relate back to the timely filed charges, which allege different violations of the Act").

Further, the fact that Local 1010 was not named as a Respondent in the amended charge is fatal to this after-the-fact allegation. Indeed, in *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 234 (1938), the Supreme Court held that a claim that an employer violated § 8(a)(2) by entering into an agreement with a union could not proceed absent the union being a party to the case. "The Act gives no express authority to the Board to invalidate contracts with independent labor organizations." *Id.* at 236. *See also Versatube Corporation*, 203 NLRB 456, 463 (1973) ("*Consolidated Edison Co. v. NLRB, supra*, on which the Respondent so heavily relies, involved an admittedly independent union which the Board had found was illegally assisted by the respondent. The Supreme Court held, *inter alia*, that the Act gave the Board no authority to invalidate a contract with an independent labor organization unless the latter had been joined as a party").[25]

POINT VII

THE BOARD HAS NO AUTHORITY TO AWARD PUNITIVE REMEDIES

In the Complaint the General Counsel does not seek any specific remedy, presumably recognizing that there is no equitable or monetary relief that can be awarded in this case.

Here, the Charging Party has come up with a completely new theory, *i.e.*, that Respondents unlawfully recognized Local 1010 in violation of § 8(a)(2). As the Board noted in *Salon/Spa at Boro, Inc.*, 356 NLRB 444, 456 (2010):

> If one were to excuse an untimely filing simply because the alleged misconduct was part of a sequence of similar events to those timely raised, the intent underlying the statute of limitations would be completely compromised. . . Without the vital limits articulated by the Board in *Carney Hospital*, nothing would stand in the way of a party's attempt to employ the "closely related" doctrine to prosecute remote actions that possess only a mere sequential and topical relationship to a timely filed charge. For these reasons, I agree with the Employer that the allegation regarding an alleged threat on September 24 is untimely and must be dismissed.

[25] Local 175 filed a charge against Local 1010 on October 2, 2017, but it was withdrawn on December 18, 2017. Thus, without Local 1010 as a party, the claim that Callahan unlawfully recognized 1010 must be dismissed.

As previously noted, if Tri-Messine did not subcontract the work to Callahan it would have been ineligible to work for Con Edison. Over 95% of its business would have been lost and it would have gone out of business resulting in unemployment for all. All 44 Local 175 regular employees of Tri-Messine would have lost their jobs if the work was not subcontracted. Instead, 17 employees were immediately hired by being placed in other unions (often at higher wage rates, and received pension and welfare benefits). The overwhelming majority of remaining employees who wished to work for Callahan were ultimately hired and receive the same OR BETTER wages and benefits than they did prior to the subcontracting. (GC Exhibit 16).[26] Thus even a limited remedy of back pay would under the special circumstances of this case be punitive as many of the employees continued to receive the same or better wages after the work was subcontracted to Callahan, *i.e.*, with no loss of employment. "The remedy chosen [by the Board] must 'achieve the remedial objectives which the [NLRA] sets forth.'" *Yorke v. NLRB*, 709 F.2d 1138, 1144-45 (7th Cir. 1983), *cert. denied* 465 U.S. 1023 (1984) (*quoting Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-11 (1940)). Indeed, during the hearing it was undisputed that Callahan had paid over $2,500,000 in pension and welfare benefits during the period March 2017-February 2018. (541). The benefits Callahan employees currently receive are comparable to what they were receiving under the Local 175 contract. (488-489).

"A make-whole remedy . . . should place the employee in the same position she would have been in had the unlawful discrimination not occurred." *Hotel Emples. & Rest. Emples. Int'l*

[26] Of the 44 former Tri-Messine regular employees represented by Local 175 listed in GC Exhibit 12, 33 are listed as working for Callahan as of December 2017 in one of its three unions. One additional employee, Christopher Smith, joined Callahan since the chart was created. (157-159). Of the 34 employees working for Callahan, 29 obtained jobs immediately or the following month April. Of the 10 employees who were not employed by Callahan, five specifically declined offers (Salvatore Alaimo, Antonio Astuto, Charlie Falzone, Robert Maresco and Giovanni Sciove), two are on workers' compensation (Abip Stebleva and Patrick Taylor) and the reasons for the remaining three are listed as "unknown" (Jonathan Otten, Salvatore Pecoraro and Frank Wolfe). Of course, Wolfe was called as a witness for the General Counsel and testified that he is working for New York Paving as a member of Local 175. (253). Thus, almost everyone who had been working for Tri-Messine who wanted to work for Callahan was ultimately hired.

Union, Local 26, 344 NLRB 567, 568, (2005). Accordingly, rather than being remedial, any remedy requiring the payment of any monies would be punitive as it would result in employees receiving compensation far greater than what they would have received if the subcontracting had not taken place, *i.e.*, jobs vs. no jobs or double payment of fund contributions. "In a regulatory and remedial statute such as the Act the sanctions are not punitive or retributive in nature." *Booster Lodge No. 405*, 185 NLRB 380, 392 (1970). "The remedies for violations of the Act are remedial in nature and not punitive in nature." *Ryan Iron Works, Inc.*, 345 NLRB. 893, 902 (2005). *See also Interplastic Corp.*, 270 NLRB 1223, 1227 (1984) ("the Act is remedial, not punitive, in its aims").

Further, demanding that Tri-Messine bargain with Local 175 would serve no purpose as there is virtually no work that Local 175 can perform. Demanding that Tri-Messine or Callahan recognize 175 and use 175 Labor would result in it being disqualified from performing Con Edison work. This would result in unemployment for Callahan's employees. This is certainly contrary to "the ultimate goals of the Act [which] was the resolution of the problem of '[depressed] wage rates and the purchasing power of wage earners in industry." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754, 105 S. Ct. 2380, 2396 (1985) *citing* 29 U. S. C. § 151. It would, of course, also be contrary to the clear "Term Renewal" provision of the agreement (GC Exhibit 6) the parties negotiated in which they agreed that either party could terminate as of June 30, 2017 with no obligations to one another thereafter.

In short, not only have there been no violations by the Respondents but any remedy at this point would be punitive and/or resulting in the loss of jobs and wages for Callahan's employees.

CONCLUSION

For all of the foregoing reasons, the complaint should be dismissed in its entirety.

Dated: Garden City, New York
May 31, 2018

BOND, SCHOENECK & KING, PLLC

By: _____

Mark N. Reinharz (MR 6201)
Attorneys for Respondents
1010 Franklin Avenue, Suite 200
Garden City, New York 11530
(516) 267-6320
mreinharz@bsk.com

APPENDIX A

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 29
Two Metro Tech Center
Suite 5100
Brooklyn, NY 11201-3838

Agency Website: www.nlrb.gov
Telephone: (718)330-7713
Fax: (718)330-7579

April 28, 2017

RICHARD A. LEVIN, ESQ.,
Assistant General Counsel
CONSOLIDATED EDIISON CO.
OF NEW YORK, INC.
4 Irving Place Rm 1820
New York, NY 10003-3502

MARK N. REINHARZ, ESQ.
Bond Schoeneck & King
1399 Franklin Ave Ste 200
Garden City, NY 11530-1679

Re: Consolidated Edison Company of New York, Inc., and its joint employer Tri-Messine Construction Company, Inc., and its alter ego, Callahan Paving Corp.
Case 29-CA-194470

Dear Mr. Levin and Mr. Reinharz:

This is to advise you that I have approved the withdrawal of the portion of the charge in the above matter that alleged that Consolidated Edison Company of New York, Inc., "Con Ed," and Tri-Messine Construction Company, Inc., "Tri-Messine," and its alter ego Callahan Paving Corp., "Callahan," are joint employers. I have also approved the withdrawal of the allegation that Con Ed and Tri-Messine/Callahan violated Section 8(a)(1) and (3) of the National Labor Relations Act by terminating employees because of their membership in Local 175, United Plant and Production Workers, "Local 175."

The remainder of the charge that alleges that Tri-Messine and Callahan are alter egos and that together they have: 1) violated Section 8(a)(5) of the Act by repudiating the Local 175

contract, and 2) violated Section 8(a)(2) of the Act by recognizing Local 1010, LIUNA, is being processed further.

Very truly yours,

KATHY DREW-KING
Regional Director

cc: John McAvoy
Consolidated Edison Company of New York, Inc.
4 Irving Pl., Rm. 1875-S,
NY, NY 10003

Tri-Messine Construction Company, Inc.,
and it's alter ego, Callahan Paving Corp.
6851 Jericho Tpke, St. 240
Syosset, NY 11791

Michele Zunno
Local 175, United Plant and Production Workers
99 Mineola Blvd,
Roslyn Heights, NY 11577

Matthew P. Rocco, ESQ.
Rothman Rocco LLP,
3 West Main Street,
Elmsofrd, NY 10523

APPENDIX B

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 29
Two Metro Tech Center
Suite 5100
Brooklyn, NY 11201-3838

Agency Website: www.nlrb.gov
Telephone: (718)330-7713
Fax: (718)330-7579

August 30, 2017

MARK N. REINHARZ, ESQ.
Bond Schoeneck & King
1399 Franklin Ave Ste 200
Garden City, NY 11530-1679

Re: Tri-Messine Construction Company, Inc.,
and its alter ego, Callahan Paving Corp.
Case 29-CA-194470

Dear Mr. Reinharz:

This is to advise you that I have approved the withdrawal of the portion of the charge that alleges that that the Employer violated the Act by domination and/or interfering with the formation and administration of Local 175, and contributing to the financial support of another labor organization.

The remaining allegations that the Employer violated Section 8(a)(3) and (5) of the Act by (i) repudiating a collective bargaining agreement with the Union; (ii) discriminating in regard to the hire and tenure of employment and other terms and conditions of employment, so as to discourage or encourage membership in a labor organization and (iv) failing to bargain the effects of their actions with Local 175 remain subject to further processing.

Very truly yours,

Teresa Poor
Acting Regional Director

cc:

Tri-Messine Construction Company, Inc.,
and it's alter ego, Callahan Paving Corp.
6851 Jericho Tpke, St. 240
Syosset, NY 11791

APPENDIX C

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 29
Two Metro Tech Center
Suite 5100
Brooklyn, NY 11201-3838

Agency Website: www.nlrb.gov
Telephone: (718)330-7713
Fax: (718)330-7579

December 18, 2017

BARBARA S. MEHLSACK, ESQ.
GORLICK KRAVITZ & LISTHAUS P.C.
17 State St Fl 4
New York, NY 10004-1501

Re: Highway, Road and Street Construction Laborers, Local 1010, LIUNA (Tri-Messine Construction Company and its alter ego, Callahan Paving Corp.)
Case 29-CB-207278

Dear Ms. Mehlsack:

This is to advise you that I have approved the withdrawal of the charge in the above matter.

Very truly yours,

KATHY DREW-KING
Regional Director

cc:

Keith Loscalzo, Business Manager
Highway, Road and Street Construction Laborers
Local 1010, LIUNA, AFL-CIO
17-20 Whitestone Expressway
Suite 200
New York, NY 11357

Local Lodge CC175, International Association of Machinists and Aerospace Workers, AFL-CIO
formerly known as Local 175, United Plant & Production Workers
99 Mineola Ave
Roslyn Heights, NY 11577-1269

Al Messina, President
Tri-Messine Construction Company, Inc.,
and it's alter ego, Callahan Paving Corp.
6851 Jericho Tpke, St. 240
Syosset, NY 11791

FORM NLRB-508
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

DO NOT WRITE IN THIS SPACE

Case	Date Filed
29-CB-207278	10/2/17

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to contact	
HIGHWAY, ROAD and STREET CONSTRUCTION LABORERS, LOCAL 1010, LIUNA	KEITH LOSCALZO, BUSINESS MGR.	
c. Address *(Street, city, state, and ZIP code)*	d. Tel. No.	e. Cell No.
17-20 WHITESTONE EXPRESSWAY, SUITE 200, WHITESTONE, NY 11357	718-836-3310	718-736-5328
	f. Fax No.	e-Mail
	718-886-8885	paversandroadbuilders@yahoo.com

h. The above-named organization(s) or its agents has *(have)* engaged in and is *(are)* engaging in unfair labor practices within the meaning of section 8(b), subsection(s) *(list subsections)* (1) & (2) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Local 1010 has caused or attempted to cause an employer to discriminate against an employee in violation of Subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on a ground other than failure to tender periodic dues causing the Employer to terminate employees. Local 1010 has restrained or coerced employees in the exercise of the rights guaranteed in Section 7. Local 1010 prematurely executed a collective agreement with Callahan Paving Corp., the alter ego of Tri-Messine Construction Company, Inc. and Local Lodge CC 175, IAM & Aerospace Workers, AFL-CIO; and Local 1010 threatened Tri-Messine that it could not use Local 175 members on the payroll of Callahan Paving; but had to use only members of Local 1010; and in doing so Local 1010 collected dues and benefit fund contributions on behalf of said Local 1010 members at a time when Local 1010 did not have a valid collective agreement with either Tri-Messine or its alter ego, Callahan Paving. Said violations are continuing.

3. Name of Employer	4a. Tel. No.	b. Cell No.
Tri-Messine Construction Company and its alter ego, Callahan Paving Corp.	516-679-9797	
	c. Fax No.	d. e-Mail
	516-781-6661	
5. Location of plant involved *(street, city, state and ZIP code)*		6. Employer representative to contact
6851 Jericho Turnpike, Suite 240, Syosset, NY 11791		Al Messina, President
7. Type of establishment *(factory, mine, wholesaler, etc.)*	8. Identify principal product or service	9. Number of workers employed
construction, asphalt paving	utility company contractor	30-40
10. Full name of party filing charge	11a. Tel. No.	b. Cell No.
Local Lodge CC 175, IAM & Aerospace Workers, AFL-CIO	516-487-3110	
	c. Fax No.	d. e-Mail
	516-487-3144	mzunno@localunion17!
11. Address of party filing charge *(street, city, state and ZIP code.)*		
99 Mineola Avenue, Roslyn Heights, NY 11577		

12. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Eric Bryon Chaikin — Eric Bryon Chaikin
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 375 Park Avenue, Suite 2607, NY NY 10152 *(date)* 10/2/ 2017

Tel. No.	212-688-0888
Cell No.	516-816-9526
Fax No.	212-594=5064
e-Mail	chaikinlaw@aol.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg.

CERTIFICATE OF SERVICE

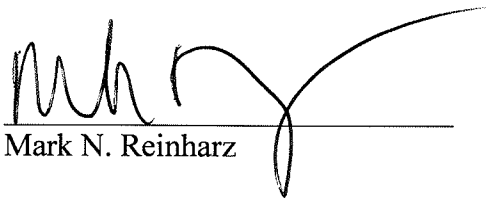
The undersigned certifies that on May 31, 2018 he served the Respondents' Memorandum of Law on the following individuals as noted:

Hon. Jeffrey P. Gardner (via email and Efile)
Administrative Law Judge NLRB Division of Judges
Jeffrey.Gardner@nlrb.gov

Eric Chaikin (via email and Efile) Chaikin & Chaikin
Attorney for Charging Party
chaikinlaw@aol.com

Francisco Guzman and Emily Cabrera (via email and Efile) Counsel for the General Counsel
National Labor Relations Board Region 29
francisco.guzman@nlrb.gov
emily.cabrera@nlrb.gov

Barbara Mehlsack (via email and Efile) Gorlick, Kravits & Kisthaus, P.C.
Attorney for Local 1010
BMehlsack@gkllaw.com



Mark N. Reinharz